

700. Homicide: General Principles

The defendant is charged with (murder/manslaughter). [Manslaughter is a lesser offense to murder.] [Murder [and manslaughter] (is/are) [a] type[s] of homicide.] Homicide is the killing of one human being by another.

[A homicide can be lawful or unlawful. If a person kills with a legally valid excuse or justification, the killing is lawful and he or she has not committed a crime. If there is no legally valid excuse or justification, the killing is unlawful and, depending on the circumstances, the person is guilty of either murder or manslaughter. You must decide whether the killing was unlawful and, if so, the specific crime committed. I will now instruct you in more detail on what is a legally permissible excuse or justification for homicide.] [I will [also] instruct you on the different types of murder [and manslaughter] and explain the differences among the crimes and degrees.]

*BENCH NOTES**Instructional Duty*

This instruction should be given if there are multiple theories of homicide or evidence supporting justification or excuse, as a way of introducing the jury to the law of homicide.

If no homicide defense instructions are given, do not give the bracketed language in the second paragraph beginning “A homicide can be lawful” If no instructions will be given on offenses other than first degree murder, do not give the last bracketed sentence.

AUTHORITY

Homicide Defined ▶ *People v. Antick* (1975) 15 Cal.3d 79, 87.

Justification or Excuse ▶ Pen. Code, § 189.5; *People v. Frye* (1992) 7 Cal.App.4th 1148, 1154–1155.

1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes—Pers, § 91.

COMMENTARY

The committee decided that a short introduction on the law of homicide will help the jury understand basic principles governing a complicated body of law. By

giving the jury a simple framework, this instruction will help the jurors understand the rest of the instructions. Although “homicide” is a classic legal term, the committee decided to use the word because it appears to now be a part of lay vocabulary and therefore easily recognizable by jurors.

701. Justifiable Homicide: Self-Defense or Defense of Another

1 **The defendant is not guilty of (murder/ [or] manslaughter/attempted murder/**
2 **[or] attempted voluntary manslaughter) if (he/she) was justified in**
3 **(killing/attempting to kill) someone in (self-defense/defense of another). The**
4 **defendant acted in lawful (self-defense/defense of another) if:**

- 5
- 6 **1. The defendant reasonably believed that (he/she/someone**
7 **else/_____ <insert name of third party>) was in danger of being**
8 **killed or suffering great bodily injury [or was in danger of being**
9 **(raped/maimed/robbed/_____ <insert other forcible and**
10 **atrocious crime>)].**
- 11
- 12 **2. The defendant reasonably believed (he/she/the other person) would**
13 **be harmed immediately.**
- 14
- 15 **3. The defendant reasonably believed that the use of deadly force was**
16 **necessary to defend against the threat.**

17

18 **AND**

- 19
- 20 **4. The defendant used no more force than was reasonably necessary to**
21 **defend against the threatened harm.**

22

23 **Belief in future harm is not sufficient, no matter how great or how likely the**
24 **harm is believed to be. The defendant must have believed there was**
25 **immediate danger of violence to (himself/herself/someone else). Defendant's**
26 **belief must have been reasonable and (he/she) must have acted only because**
27 **of that belief. The defendant is only entitled to use that amount of force that a**
28 **reasonable person would believe is necessary in the same situation. If the**
29 **defendant used more force than was reasonable, then the killing was not**
30 **justified.**

31

32 **When deciding whether the defendant's beliefs were reasonable, consider all**
33 **the circumstances as they were known to and appeared to the defendant and**
34 **consider what a reasonable person in a similar situation with similar**
35 **knowledge would have believed. If the defendant's beliefs were reasonable,**
36 **the danger does not need to have actually existed.**

37

38 [The defendant's belief that (he/she/someone else) was threatened may be
39 reasonable even if (he/she) relied on information that was not true. However,
40 the defendant must actually and reasonably have believed that the
41 information was true.]

42
43 [If you find that _____<insert name or description of decedent/victim>
44 threatened or harmed the defendant in the past, you may consider that
45 information in deciding whether the defendant's conduct and beliefs were
46 reasonable.]

47
48 [If _____<insert name or description of decedent/victim> threatened or
49 harmed the defendant in the past, the defendant may have been justified in
50 acting more quickly or taking greater self-defense measures than if there had
51 been no earlier threat or harm.]

52
53 [If you find that the defendant knew that _____<insert name or
54 description of decedent/victim> had threatened or harmed others in the past,
55 you may consider that information in deciding whether the defendant's
56 conduct and beliefs were reasonable.]

57
58 [If the defendant received a threat from someone else that (he/she) reasonably
59 associated with _____<insert name or description of decedent/victim>,
60 you may consider that threat in deciding whether the defendant was justified
61 in acting in self-defense.]

62
63 [A defendant is not required to retreat. He or she is entitled to stand his or
64 her ground and defend himself or herself and, if reasonably necessary, to
65 pursue an assailant until the danger of (death/great bodily injury/ _____
66 <insert forcible and atrocious crime>) has passed. This is so even if safety
67 could have been achieved by retreating.]

68
69 The People have the burden of proving beyond a reasonable doubt that the
70 [attempted] killing was not justified. If the People have not met this burden,
71 you must find the defendant not guilty of (murder/ [or]
72 manslaughter/attempted murder/ [or] attempted voluntary manslaughter).

73
74 [Great bodily injury means significant or substantial physical injury.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on self-defense when “it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant’s theory of the case.” (*People v. Breverman* (1998) 19 Cal.4th 142, 157 [addressing duty to instruct on voluntary manslaughter as lesser included offense, but also discussing duty to instruct on defenses generally]; see also *People v. Lemus* (1988) 203 Cal.App.3d 470, 478 [if substantial evidence of self-defense exists, court must instruct sua sponte and let jury decide credibility of witnesses].)

If there is substantial evidence of self-defense that is inconsistent with the defendant’s testimony, the court must ascertain whether the defendant wants an instruction on self-defense. (*People v. Breverman, supra*, 19 Cal.4th at p. 156.) The court is then required to give the instruction if the defendant so requests. (*People v. Elize* (1999) 71 Cal.App.4th 605, 611–615.)

On defense request and when supported by sufficient evidence, the court must instruct that the jury may consider the effect of “antecedent threats and assaults against the defendant on the reasonableness of defendant’s conduct.” (*People v. Garvin* (2003) 110 Cal.App.4th 484, 488.) The court must also instruct that the jury may consider previous threats or assaults by the aggressor against someone else or threats received by the defendant from a third party that the defendant reasonably associated with the aggressor (See *People v. Pena* (1984) 151 Cal.App.3d 462, 475; *People v. Minifie* (1996) 13 Cal.4th 1055, 1065, 1068.)

Forcible and atrocious crimes are generally those crimes whose character and manner reasonably create a fear of death or serious bodily harm. (*People v. Ceballos* (1974) 12 Cal.3d 470, 479.) The following crimes have been deemed forcible and atrocious as a matter of law: murder, mayhem, rape, and robbery. (*Id.* at p. 478.) If the defendant is asserting that he or she was resisting the commission of one of these felonies or another specific felony, the court should include the bracketed language at the end of element 1 and select “raped,” “maimed,” or “robbed,” or insert another appropriate forcible and atrocious crime. In all other cases involving death or great bodily injury, the court should use element 1 without the bracketed language.

Related Instructions

Instructions 702–707, Justifiable and Excusable Homicides.

Instructions 690–697, Defense Instructions: Defense of Self, Another, Property.

Instruction 751, Voluntary Manslaughter: Imperfect Self-Defense.

AUTHORITY

Fear ▶ Pen. Code, § 198.

Justifiable Homicide ▶ Pen. Code, §§ 197–199.

Lawful Resistance ▶ Pen. Code, §§ 692–694.

Burden of Proof ▶ Pen. Code, § 189.5; *People v. Banks* (1976) 67 Cal.App.3d 379, 383–384.

Elements ▶ *People v. Humphrey* (1996) 13 Cal.4th 1073, 1082.

Forcible and Atrocious Crimes ▶ *People v. Ceballos* (1974) 12 Cal.3d 470, 478–479.

Imminence ▶ *People v. Aris* (1989) 215 Cal.App.3d 1178, 1187.

No Duty to Retreat ▶ *People v. Hughes* (1951) 107 Cal.App.2d 487, 493; *People v. Hatchett* (1942) 56 Cal.App.2d 20, 22.

Reasonable Belief ▶ *People v. Humphrey* (1996) 13 Cal.4th 1073, 1082; *People v. Clark* (1982) 130 Cal.App.3d 371, 377.

1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Defenses, §§ 64–77.

COMMENTARY

Penal Code section 197, subdivision 1 provides that self-defense may be used in response to threats of death or great bodily injury, or to resist the commission of a felony. (Pen. Code, § 197, subd. 1.) However, in *People v. Ceballos* (1974) 12 Cal.3d 470, 477–479, the court held that although the latter part of section 197 appears to apply when a person resists the commission of any felony, it should be read in light of common law principles that require the felony to be “some atrocious crime attempted to be committed by force.” (*Id.* at p. 478.) This instruction is therefore designed to be given when self-defense is used in response to threats of great bodily injury or death *or* when self-defense is used to resist the commission of forcible and atrocious crimes.

RELATED ISSUES

Imperfect Self-Defense

Most courts hold that an instruction on imperfect self-defense is required in every case in which a court instructs on perfect self-defense. If there is substantial evidence of a defendant’s belief in the need for self-defense, there will *always* be substantial evidence to support an imperfect self-defense instruction because the reasonableness of that belief will always be at issue. (*People v. Ceja* (1994) 26 Cal.App.4th 78, 85–86; *People v. DeLeon* (1997) 10 Cal.App.4th 815, 824.) The court in *People v. Rodriguez* disagreed, however, and found that an imperfect self-defense instruction was not necessary when defendant’s version of the crime

“could only lead to an acquittal based on justifiable homicide,” and when the prosecutor’s version could only lead to a conviction of first degree murder. (*People v. Rodriguez* (1992) 53 Cal.App.4th 1250, 1275; see also *People v. Williams* (1992) 4 Cal.4th 354, 362 [in rape prosecution, no mistake-of-fact instruction was required where two sides gave wholly divergent accounts with no middle ground to support a mistake-of-fact instruction].)

No Defense for Initial Aggressor

An aggressor whose victim fights back in self-defense may not invoke the doctrine of self-defense against the victim’s legally justified acts. (*In re Christian S.* (1994) 7 Cal.4th 768, 773, fn. 1.) If the aggressor attempts to break off the fight and communicates this to the victim, but the victim continues to attack, the aggressor may use self-defense against the victim to the same extent as if he or she had not been the initial aggressor. (Pen. Code, § 197, subd. 3; *People v. Trevino* (1988) 200 Cal.App.3d 874, 879; see Instruction 691, Right to Self-Defense: Mutual Combat or Initial Aggressor.)

Transferred Intent Applies

“[T]he doctrine of self-defense is available to insulate one from criminal responsibility where his act, justifiably in self-defense, inadvertently results in the injury of an innocent bystander.” (*People v. Mathews* (1979) 91 Cal.App.3d 1018, 1024; see also *People v. Curtis* (1994) 30 Cal.App.4th 1337, 1357.) There is no sua sponte duty to instruct on this principle, although such an instruction must be given upon request when substantial evidence supports it. (*People v. Mathews*, *supra*, 91 Cal.App.3d at p. 1025; see also Instruction 742, Transferred Intent.)

702. Justifiable Homicide: Defending Against Harm to Person Within Home

1 **Under some circumstances, the defendant is not guilty of (murder/ [or]**
2 **manslaughter) if (he/she) killed to defend (himself/herself) [or any other**
3 **person] in the defendant's home. Such a killing is justified, and therefore not**
4 **unlawful, if:**

5
6 **1. The defendant reasonably believed that _____***<insert name or*
7 *description of decedent>* **(intended to or tried to commit _____**
8 *<insert forcible and atrocious crime>* **/ [or] forcibly tried to enter the**
9 **home intending to act violently against someone inside).**

10
11 **2. The defendant reasonably believed (he/she/someone**
12 **else/ _____** *<insert name of third party>*) **would be harmed**
13 **immediately.**

14
15 **3. The defendant reasonably believed that the use of deadly force was**
16 **necessary to defend against the threat.**

17
18 **AND**

19
20 **4. The defendant used no more force than was reasonably necessary to**
21 **defend against the threatened harm.**

22
23 **Belief in future harm is not sufficient, no matter how great or how likely the**
24 **harm is believed to be. The defendant must have believed there was**
25 **immediate danger of violence to (himself/herself/someone else). Defendant's**
26 **belief must have been reasonable and (he/she) must have acted only because**
27 **of that belief. The defendant is entitled to use only that amount of force that a**
28 **reasonable person would believe is necessary in the same situation. If the**
29 **defendant used more force than was reasonable, then the killing was not**
30 **justified.**

31
32 **When deciding whether the defendant's beliefs were reasonable, consider all**
33 **the circumstances as they were known to and appeared to the defendant and**
34 **consider what a reasonable person in a similar situation with similar**
35 **knowledge would have believed. If the defendant's beliefs were reasonable,**
36 **the danger does not need to have actually existed.**

38 [A defendant is not required to retreat. He or she is entitled to stand his or
39 her ground and defend himself or herself and, if reasonably necessary, to
40 pursue an assailant until the danger of (death/bodily injury/ _____
41 <insert forcible and atrocious crime>) has passed. This is so even if safety
42 could have been achieved by retreating.]
43
44 The People have the burden of proving beyond a reasonable doubt that the
45 killing was not justified. If the People have not met this burden, you must find
46 the defendant not guilty of (murder/ [or] manslaughter).

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give instructions supported by substantial evidence and not inconsistent with the defendant's theory of the case. (See *People v. Baker* (1999) 74 Cal.App.4th 243, 252; *People v. Barton* (1995) 12 Cal.4th 186, 195; *People v. Slater* (1943) 60 Cal.App.2d 358, 367–368 [error to refuse instruction based on Pen. Code, § 197, subd. 2 when substantial evidence supported inference that victim intended to enter the habitation].)

Penal Code section 197, subdivision 2 provides that “defense of habitation” may be used to resist someone who “intends or endeavors, by violence or surprise, to commit a felony . . .” (Pen. Code, § 197, subd. 2.) However, in *People v. Ceballos* (1974) 12 Cal.3d 470, 477–479, the court held that the felony feared must be “some atrocious crime attempted to be committed by force.” (*Id.* at p. 478.) Forcible and atrocious crimes are those crimes whose character and manner reasonably create a fear of death or serious bodily harm. (*People v. Ceballos, supra*, 12 Cal.3d at p. 479.) The following crimes have been deemed forcible and atrocious as a matter of law: murder, mayhem, rape, and robbery. (*Id.* at p. 478.) *Ceballos* specifically held that burglaries which “do not reasonably create a fear of great bodily harm” are not sufficient “cause for exaction of human life.” (*Id.* at p. 479.) Thus, although the statute refers to “defense of habitation,” *Ceballos* requires that a person be at risk of great bodily harm or an atrocious felony in order to justify homicide. (*Ibid.*) The instruction has been drafted accordingly.

If the defendant is asserting that he or she was resisting the commission of a forcible and atrocious crime, give the first option in element 1 and insert the name of the crime. If there is substantial evidence that the defendant was resisting a violent entry into a residence for the general purpose of committing violence

against someone inside, give the second option in element 1. (See Pen. Code, § 197, subd. 2.)

AUTHORITY

Instructional Requirements ▶ Pen. Code, § 197, subd. 2.

Actual and Reasonable Fear ▶ See Pen. Code, § 198; see *People v. Curtis* (1994) 30 Cal.App.4th 1337, 1361.

Burden of Proof ▶ Pen. Code, § 189.5.

Fear of Imminent Harm ▶ *People v. Humphrey* (1996) 13 Cal.4th 1073, 1082; *People v. Lucas* (1958) 160 Cal.App.2d 305, 310.

Forcible and Atrocious Crimes ▶ *People v. Ceballos* (1974) 12 Cal.3d 470, 478–479.

No Duty to Retreat ▶ *People v. Hughes* (1951) 107 Cal.App.2d 487, 493; *People v. Hatchett* (1942) 56 Cal.App.2d 20, 22.

1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Defenses, § 78, p. 414.

STAFF NOTES

The instruction is modeled in part on Instruction 701, Justifiable Homicide: Self-defense or Defense of Another.

Elements

Penal Code section 197(2) provides:

Homicide is also justifiable when committed by any person in any of the following cases:

...

2. When committed in defense of habitation, property, or person, against one who manifestly intends or endeavors, by violence or surprise, to commit a felony, or against one who manifestly intends and endeavors, in a violent, riotous or tumultuous manner, to enter the habitation of another for the purpose of offering violence to any person therein[.]

Justifiable versus Excusable

The distinction between justifiable and excusable homicide was discussed in *People v. Orr* (1994) 22 Cal.App.4th 780, 784:

[I]n order to convict a person of voluntary manslaughter, the jury must find that the killing was intended and was *unlawful* in that it was *neither justifiable*, that is, did not constitute lawful defense of self, others, or property, prevention of a felony, or preservation of the peace (§ 197 . . .); *nor excusable*, that is, the killing did not result from a lawful act done by lawful means with ordinary caution and a lawful intent, and did not result from accident and misfortune under very specific circumstances, including that no dangerous weapon was used (§ 195 . . .).

In *Gilmore v. Superior Court* (1991) 230 Cal.App.3d 416, 420, the court defined justifiable:

[T]he Penal Code's characterization of certain acts, otherwise unlawful, as "justifiable" is simply the application of a common law label to conduct modernly described as privileged.

Imminent Danger

In *People v. Lucas* (1958) 160 Cal.App.2d 305, 310, in which self-defense was asserted, the court generally stated:

The danger which justifies homicide must be imminent . . . and a mere fear that danger will become imminent is not enough . . .

Actual, Reasonable Fear

The fear must be actual and reasonable, pursuant to Penal Code section 198:

A bare fear of the commission of any of the offenses mentioned in subdivisions 2 and 3 of Section 197, to prevent which homicide may be lawfully committed, is not sufficient to justify it. But the circumstances must be sufficient to excite the fears of a reasonable person, and the party killing must have acted under the influence of such fears alone.

Language of Instruction

The statute uses the terms “dwelling” and “habitation.” The instruction uses the synonyms “home” and “residence.” The statute uses the phrase enter the home in a “violent, riotous or tumultuous manner.” Because “riotous” and “tumultuous” are synonyms for “violent,” the instruction uses only this term. Likewise, the statute uses the phrase commit a felony “by violence or surprise.” The *Ceballos* court concluded that the word “surprise” is redundant. (*People v. Ceballos* (1974) 12 Cal.3d 470, 478.)

703. Justifiable Homicide: By Public Officer

The defendant is not guilty of (murder/ [or] manslaughter) if (he/she) killed someone while (acting as a public officer/obeying a public officer's command for aid and assistance). Such a killing is justified, and therefore not unlawful, if:

- 1. The defendant was (a public officer/obeying a public officer's command for aid and assistance).**
- 2. The killing was committed while (taking back into custody a convicted felon [or felons] who had escaped from prison or confinement[,]/ arresting a person [or persons] charged with a felony who (was/were) resisting arrest or fleeing from justice[,]/ overcoming actual resistance to some legal process [,]/ [or] while performing any [other] legal duty.)**
- 3. The killing was necessary to accomplish (one of those/that) lawful purpose[s].**

AND

- 4. The defendant had probable cause to believe that _____ <insert name[s] or description[s] of decedent[s]> posed a threat of serious physical harm, either to the defendant or to others.**

A person has *probable cause* to believe that someone poses a threat of serious physical harm when he or she knows facts that would lead a person of ordinary care and prudence to honestly and strongly suspect that the other person will cause serious physical harm to another person.

[An officer [or employee] of _____ <insert name of state or local government agency that employs public officer> is a *public officer*.]

The People have the burden of proving beyond a reasonable doubt that the killing was not justified. If the People have not met this burden, you must find the defendant not guilty of (murder/ [or] manslaughter).

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give instructions supported by substantial evidence and not inconsistent with the defendant's theory of the case. (See *People v. Baker* (1999) 74 Cal.App.4th 243, 252; *People v. Barton* (1995) 12 Cal.4th 186, 195.)

In element 2, select the phrase appropriate for the facts of the case.

As with a peace officer, the jury must determine whether the defendant was a public officer. (*People v. Brown* (1988) 46 Cal.3d 432, 444–445.) The court may instruct the jury in the appropriate definition of “public officer” from the statute (e.g., “a Garden Grove Regular Police Officer and a Garden Grove Reserve Police Officer are peace officers”). (*Ibid.*) However, the court may not instruct the jury that the defendant was a public officer as a matter of law (e.g., “Officer Reed was a peace officer”). (*Ibid.*)

Related Instructions

Instruction 704, Justifiable Homicide: Citizen Arrest (Non-Peace Officer).

Instruction 705, Justifiable Homicide: Non-Peace Officer Preserving the Peace.

AUTHORITY

Justifiable Homicide by Public Officer ▶ Pen. Code, §§ 196, 199.

Burden of Proof ▶ Pen. Code, § 189.5; *People v. Frye* (1992) 7 Cal.App.4th 1148, 1154–1155; *People v. Banks* (1976) 67 Cal.App.3d 379, 383–384.

Public Officer ▶ See Pen. Code, §§ 831(a) [custodial officer], 831.4 [sheriff's or police security officer], 831.5 [custodial officer], 831.6 [transportation officer], 3089 [county parole officer]; *In re Frederick B.* (1987) 192 Cal.App.3d 79, 89–90 [“public officers” is broader category than “peace officers”]; see also Pen. Code, § 836.5(a) [authority to arrest without warrant].

1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Defenses, §§ 82, 85, 243, pp. 419, 422, 614.

RELATED ISSUES

Fourth Amendment Limitation on Use of Deadly Force

Deadly force may not be used to prevent the escape of an apparently unarmed suspected felon unless it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others. (*Tennessee v. Garner* (1985) 471 U.S. 1, 3, 11; see *People v. Martin* (1985) 168 Cal.App.3d 1111, 1124.)

Killing Committed in Obedience to Judgment

A homicide is also justifiable when committed by a public officer “in obedience to any judgment of a competent court.” (Pen. Code, § 196, subd. 1.) There are no reported cases construing this subdivision. This provision appears to apply exclusively to lawful executions.

STAFF NOTES

Elements

Penal Code section 196 provides:

Homicide is justifiable when committed by public officers and those acting by their command in their aid and assistance, either—

1. In obedience to any judgment of a competent Court; or,
2. When necessarily committed in overcoming actual resistance to the execution of some legal process, or in the discharge of any other legal duty; or,
3. When necessarily committed in retaking felons who have been rescued or have escaped, or when necessarily committed in arresting persons charged with felony, and who are fleeing from justice or resisting such arrest.

The terms “escape” and “rescue” in section 197(3) apparently refer to those terms as they’re used in Penal Code section 4530–4537 (escape) and 4550 (rescue).

If justification is shown, the defendant is acquitted pursuant to Penal Code section 199:

The homicide appearing to be justifiable or excusable, the person indicted must, upon his trial, be fully acquitted and discharged.

Fourth Amendment Limitation on Use of Deadly Force

Tennessee v. Garner (1985) 471 U.S. 1, 7, 11–12:

This case requires us to determine the constitutionality of the use of deadly force to prevent the escape of an apparently unarmed suspected felon. We conclude that such force may not be used unless it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others. [. . .]

While it is not always clear just when minimal police interference becomes a seizure, [. . .] there can be no question that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment. [. . .] The use of deadly force to prevent the escape of

all felony suspects, whatever the circumstances, is constitutionally unreasonable. [. . .] Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so. [. . .] A police officer may not seize an unarmed, nondangerous suspect by shooting him dead. [. . .] Where the officer[, however,] has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.

See *People v. Martin* (1985) 168 Cal.App.3d 1111, 1124:

Garner necessarily limits the scope of justification for homicide under section 197, subdivision 4, and other similar statutes from the date of that decision [. . .]

Reasonable Fear of Death or Serious Bodily Injury

The homicide must be reasonable under the circumstances, as held in *Martinez v. Superior Court* (1996) 47 Cal.App.4th 334, 349:

The test for determining whether a homicide was justifiable under Penal Code section 196 is whether the circumstances "reasonably create[d] a fear of death or serious bodily harm to the officer or to another." (*Kortum v. Alkire* (1977) 69 Cal.App.3d 325, 333 [. . .]; accord, *Reynolds, supra*, 858 F. Supp. at pp. 1074-1075; *People v. Rivera* (1992) 8 Cal. App. 4th 1000, 1007 [. . .] [using Fourth Amendment "reasonableness" analysis to determine existence of probable cause for arrest, held that use of attack dog by police officer was justified because the officer "reasonably feared for his safety, and that of others in the area"].)

Such circumstances include that fact that a suspected felon had committed a violent felony, as held in *Kortum v. Alkire* (1977) 69 Cal.App.3d 325, 333 [dicta in civil case]:

Thus it appears [. . .] that the applicable sections of the California Penal Code, as construed by the courts of this state, prohibit the use of deadly force by anyone, including a police officer, against a fleeing felony suspect

unless the felony is of the violent variety, i.e., a forcible and atrocious one which threatens death or serious bodily harm, or there are other circumstances which reasonably create a fear of death or serious bodily harm to the officer or to another.

Public Officer

The bracketed paragraph defining “public officer” is copied from instruction 901, Taking Firearm or Weapon While Resisting Public Officer.

“Public officers” include a custodial officer (Pen. Code, §§ 831(a), 831.5), a sheriff’s or police security officer (Pen. Code, § 831.4), and a transportation officer (Pen. Code, § 831.6).

See also *In re Rochelle B.* (1996) 49 Cal.App.4th 1212, 1221 [although juvenile hall probation counselor may be a peace and public officer, she was not a “custodial officer” for purposes of Pen. Code, § 243.1]; *People v. Showalter* (1932) 126 Cal.App. 665, 669 [court appointed receiver not a public officer].

Courts may look to the source of the public office and its corresponding duties, as discussed in *People v. Olsen* (1986) 186 Cal.App.3d 257, 265–266:

“[One] of the prime requisites [of a public office] is that [it] be created by the *constitution* or authorized by some *statute*. And it is essential that the incumbent be clothed with some portion of the sovereign functions of government, either legislative, executive, or judicial to be exercised in the interest of the public. There must also be a duty or service to be performed, and it is the nature of this duty, not its extent, that brings into existence a public office and a *public officer*. [Footnote omitted.] . . .” [Quoting Cal.Jur.3d Public Officers and Employees.]

Probable Cause

The definition of probable cause is adapted from the definition of probable cause for arrest in Instruction 859, Battery Against Peace Officer.

This definition is based on well-settled California law, as set forth in *People v. Fischer* (1957) 49 Cal.2d 442, 446:

Probable cause for an arrest is shown if a man of ordinary caution or prudence would be led to believe and conscientiously entertain a strong suspicion of the guilt of the accused.

704. Justifiable Homicide: Citizen Arrest (Non-Peace Officer)

1 **The defendant is not guilty of (murder/ [or] manslaughter) if (he/she) killed**
2 **someone while trying to arrest him or her for a violent felony. Such a killing**
3 **is justified, and therefore not unlawful, if:**

4
5 **1. The defendant committed the killing while lawfully trying to arrest**
6 **or detain _____** *<insert name or description of decedent>* **who**
7 **had just committed _____** *<insert forcible and atrocious crime*
8 *or felony that threatened death or great bodily harm>.*

9
10 **2. The defendant had probable cause to believe that _____**
11 *<insert name or description of decedent>* **posed a threat of serious**
12 **physical harm, either to the defendant or to others.**

13
14 **AND**

15
16 **3. The killing was necessary to prevent _____'s** *<insert name or*
17 *description of decedent>* **escape.**

18
19 **A person has *probable cause* to believe that someone poses a threat of serious**
20 **physical harm when he or she knows facts that would lead a person of**
21 **ordinary care and prudence to honestly and strongly suspect that the other**
22 **person will cause serious physical harm to another person.**

23
24 **In order for the killing to be justified, _____** *<insert name or description*
25 *of decedent>* **must have actually committed _____** *<insert forcible and*
26 *atrocious crime or felony that threatened death or great bodily harm>* **and the**
27 **defendant must have known or had reason to believe that _____** *<insert*
28 *name or description of decedent>* **committed that crime.**

29
30 **The People have the burden of proving beyond a reasonable doubt that the**
31 **killing was not justified. If the People have not met this burden, you must find**
32 **the defendant not guilty of (murder/ [or] manslaughter).**
33

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on justifiable homicide when “it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant’s theory of the case.” (See *People v. Breverman* (1998) 19 Cal.4th 142, 156 [addressing sua sponte duty to instruct on self-defense].)

Related Instructions

Instruction 703, Justifiable Homicide: By Public Officer.

Instruction 705, Justifiable Homicide: Non-Peace Officer Preserving the Peace.

AUTHORITY

Justifiable Homicide to Preserve the Peace ▶ Pen. Code, §§ 197, subd. 4, 199.

Lawful Resistance to Commission of Offense ▶ Pen. Code, §§ 692–694.

Private Persons, Authority to Arrest ▶ Pen. Code, § 837.

Burden of Proof ▶ Pen. Code, § 189.5; *People v. Frye* (1992) 7 Cal.App.4th 1148, 1154–1155.

Felony Must Threaten Death or Great Bodily Injury ▶ *People v. Piorkowski* (1974) 41 Cal.App.3d 324, 328–329.

1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Defenses, §§ 80–86, pp. 417–426.

RELATED ISSUES

Felony Must Actually Be Committed

A private citizen may use deadly force to apprehend a fleeing felon only if the suspect in fact committed the felony and the person using deadly force had reasonable cause to believe so. (*People v. Lillard* (1912) 18 Cal.App. 343, 345.)

Felony Committed Must Threaten Death or Great Bodily Injury

Deadly force is permissible to apprehend a felon if “the felony committed is one which threatens death or great bodily injury. . . .” (*People v. Piorkowski* (1974) 41 Cal.App.3d 324, 328–329).

Person Using Force Must Fear Imminent Death or Bodily Injury

“Deadly force may not be used to prevent the escape of an apparently unarmed suspected felon unless it is necessary to prevent the escape and the officer has

probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.” (*Tennessee v. Garner* (1985) 471 U.S. 1, 3, 11.) “*Garner* necessarily limits the scope of justification for homicide under section 197, subdivision 4, and other similar statutes from the date of that decision.” (*People v. Martin* (1985) 168 Cal.App.3d 1111, 1124.)

STAFF NOTES

Elements

Penal Code section 197(4) states:

Homicide is also justifiable when committed by any person in any of the following cases:

...

4. When necessarily committed in attempting, by lawful ways and means, to apprehend any person for any felony committed, or in lawfully suppressing any riot, or in lawfully keeping and preserving the peace.

Two additional requirements have been imposed by cases interpreting the “apprehension of a felon” provision: (1) that the felony actually has been committed and (2) that the felony threatens danger or great bodily harm and force is necessary to apprehend the felon.

Felony Must Actually Be Committed

Courts have qualified the right of a private citizen to use deadly force to apprehend a fleeing felon with the requirement that the suspect in fact committed the felony and that the person using deadly force had reasonable cause to so believe. (*People v. Lillard* (1912) 18 Cal.App. 343, 345.)

Penal Code section 837 provides:

A private person may arrest another:

1. For a public offense committed or attempted in his presence.
2. When the person arrested has committed a felony, although not in his presence.
3. When a felony has been in fact committed, and he has reasonable cause for believing the person arrested to have committed it.

In *People v. Piorkowski* (1974) 41 Cal.App.3d 324, 328, the court stated:

[T]he right to arrest (and to exercise such force as authorized to accomplish it) must be justified under subdivisions 2 or 3 of section 837. In either instance, there must be established the fact that a felony has in fact been committed. [. . .] “For there to be a valid arrest by a private citizen under Penal Code section 837 subdivision 3 [and, we add, under subdivision 2], the requirement that there in fact be a felony committed can only be met if

there is evidence of corpus delicti and it is an offense known by the arresting party to have been committed.”

The court concluded that this was a question of fact for the jury and the court below had properly instructed on this question. (*Id.* at 333; compare *People v. Walker* (1973) 32 Cal.App.3d 897, 902 [instruction that burglary occurred as a matter of law in a justifiable homicide case should have been given where the evidence was uncontradicted that crime had been committed].)

Dangerous or Life Threatening Felonies

Although Penal Code section 197(4) appears to apply to any felony, cases deciding whether deadly force was justified in apprehending a felon have construed the section to apply only to felonies that threaten death or great bodily harm. (*People v. Piorkowski* (1974) 41 Cal.App.3d 324, 329–330; *People v. Quesada* (1980) 113 Cal.App.3d 533, 537–540 [same]; but see *People v. Martin* (1985) 168 Cal.App.3d 1111.) *Piorkowski, supra*, at page 328–329, stated:

It appears that the principle that deadly force may be directed toward the arrest of a felon is a correct statement of the law only where the felony committed is one which threatens death or great bodily injury. [Citations omitted.] We are not of the opinion that Penal Code section 197, subdivision 4, mandates a different result.

See also *Gilmore v. Superior Court* (1991) 230 Cal.App.3d 416, 422:

[W]e do not reach the question whether the use of deadly force is privileged as a matter of law in all cases of first degree burglary. Penal Code section 459 covers a wide range of conduct, much of which would not have constituted burglary at common law. [Citation.] As the Supreme Court pointed out in *Ceballos*, the common law sanctioned the use of deadly force only in situations where the felony being committed could be characterized as "forcible and atrocious." [Citation.] Where the offense is burglary, this standard is satisfied where the circumstances of the particular case establish that the perpetrator's conduct "threatened, or was reasonably believed to threaten, death or serious bodily harm."

In *Piorkowski*, the court construed section 197(4) in light of common law and imposed the requirement that “the felony committed is one which threatens death or great bodily harm.” (*People v. Piorkowski, supra*, 41 Cal.App.3d at 329.) The court approved the following instruction on this point:

“A homicide is justifiable when necessarily committed in making the arrest of a person who has actually committed a felony and is fleeing from justice or resisting arrest and cannot otherwise be taken but the facts and circumstances must be such as to justify the conclusion that the use of such a degree of force was reasonably necessary.”

(*Id.* at 331.)

Applying this requirement, the court found that the victim’s daytime nonforcible burglary of a dry-cleaning business did not create a life-threatening risk that justified defendant’s use of deadly force to arrest the fleeing suspects. *People v. Quesada* (1980) 113 Cal.App.3d 533, 537–540, came to the same conclusion that justifiable homicide was not available as a defense when the defendant attempted a nighttime arrest of a person who had burglarized his house two days earlier. The trial court refused to instruct the jury that “homicide is justifiable ‘when necessarily committed in attempting, by lawful ways and means, to apprehend any person who has committed burglary of the first degree,’” because the victim’s burglary of a unoccupied house was not a crime that threatened death or serious bodily injury. (*People v. Quesada, supra*, 113 Cal.App.3d at pp. 539–540.)

People v. Martin (1985) 168 Cal.App.3d 1111, came to a different result on arguably similar facts. The defendant in *Martin* killed a would-be nighttime burglar of an unoccupied residence who was fleeing the scene—a crime arguably not considered life threatening or dangerous by *Piorkowski* and *Quesada*. *Martin* reviewed and agreed with the analysis of these courts but distinguished those cases in that *Piorkowski* involved a daytime burglary and *Quesada* involved a nighttime apprehension of the felon that occurred two days after the commission of the burglary. In addition to distinguishing these cases factually, *Martin* found that the nighttime burglary it was addressing was a common law crime at the time section 197(4) was enacted, and because it is presumed that the Legislature intended to include in section 197(4)’s ambit any crimes that were felonies at common law, the statutory provision should apply.

However, *Martin* specifically limited its holding “to felons fleeing after the commission of a crime which was a felony at common law.” The court also restricted its decision to “offenses alleged to have occurred prior to the decision in *Tennessee v. Garner* (1985) 471 U.S. 1.” (*People v. Martin, supra*, 168 Cal.App.3d at 1125 [*Garner* held unconstitutional a Tennessee state statute that authorized the use of deadly force to apprehend unarmed and apparently non-dangerous suspects; see Staff Notes to instruction 704.] “*Garner* necessarily limits

the scope of justification for homicide under section 197, subdivision 4, and other similar statutes from the date of that decision [. . .]” (*Id.* at p. 1124.)

705. Justifiable Homicide: Non-Peace Officer Preserving the Peace

1 **The defendant is not guilty of (murder/ [or] manslaughter) if (he/she) killed**
2 **someone while preserving the peace. Such a killing is justified, and therefore**
3 **not unlawful, if:**

4
5 **1. The defendant committed the killing while lawfully (suppressing a**
6 **riot/keeping and preserving the peace).**

7
8 **2. The defendant had probable cause to believe that _____**
9 **<insert name or description of decedent> posed a threat of serious**
10 **physical harm, either to the defendant or someone else.**

11
12 **AND**

13
14 **3. The killing was necessary to lawfully (suppress a riot/keep and**
15 **preserve the peace).**

16
17 **A person has *probable cause* to believe that someone poses a threat of serious**
18 **physical harm when he or she knows facts that would lead a person of**
19 **ordinary care and prudence to honestly and strongly suspect that the other**
20 **person will cause serious physical harm to another person.**

21
22 **[A *riot* occurs when two or more people, acting together and without legal**
23 **authority, disturb the public peace by use of force or violence or by threat to**
24 **use force or violence with the immediate ability to carry out those threats.][A**
25 **disturbance of the public peace may happen in any place of confinement.**
26 **_____<insert name of detention facility> is a place of confinement.]**

27
28 **The People have the burden of proving beyond a reasonable doubt that the**
29 **killing was not justified. If the People have not met this burden, you must find**
30 **the defendant not guilty of (murder/ [or] manslaughter).**

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on justifiable homicide when “it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the

defendant's theory of the case.” (See *People v. Breverman* (1998) 19 Cal.4th 142, 156 [addressing sua sponte duty to instruct on self-defense].)

Related Instructions

Instruction 703, Justifiable Homicide: By Public Officer.

Instruction 704, Justifiable Homicide: Citizen Arrest (Non-Peace Officer).

AUTHORITY

Justifiable Homicide to Preserve the Peace ▶ Pen. Code, §§ 197, subd. 4, 199.

Lawful Resistance to the Commission of an Offense ▶ Pen. Code, §§ 692–694.

Riot Defined ▶ Pen. Code, § 404(a).

Burden of Proof ▶ Pen. Code, § 189.5; *People v. Frye* (1992) 7 Cal.App.4th 1148, 1154–1155.

1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Defenses, §§ 80–86, pp. 417–426.

RELATED ISSUES

Person Using Force Must Fear Imminent Death or Bodily Injury

“Deadly force may not be used to prevent the escape of an apparently unarmed suspected felon unless it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.” (*Tennessee v. Garner* (1985) 471 U.S. 1, 3, 11.) “*Garner* necessarily limits the scope of justification for homicide under section 197, subdivision 4, and other similar statutes from the date of that decision.” (*People v. Martin* (1985) 168 Cal.App.3d 1111, 1124.)

STAFF NOTES

Elements

Penal Code section 197(4) states:

Homicide is also justifiable when committed by any person in any of the following cases:

...

4. When necessarily committed in attempting, by lawful ways and means, to apprehend any person for any felony committed, or in lawfully suppressing any riot, or in lawfully keeping and preserving the peace.

No authority was found that elaborated further on the meaning of “suppressing any riot” or “lawfully keeping and preserving the peace.” The instruction uses the statutory language.

A “riot” is defined in Penal Code section 404:

(a) Any use of force or violence, disturbing the public peace, or any threat to use force or violence, if accompanied by immediate power of execution, by two or more persons acting together, and without authority of law, is a riot.

(b) As used in this section, disturbing the public peace may occur in any place of confinement. Place of confinement means any state prison, county jail, industrial farm, or road camp, or any city jail, industrial farm, or road camp, or any juvenile hall, juvenile camp, juvenile ranch, or juvenile forestry camp.

706. Excusable Homicide: Accident

1 **The defendant is not guilty of (murder/ [or] manslaughter) if (he/she) killed**
2 **someone as a result of accident or misfortune. Such a killing is excused, and**
3 **therefore not unlawful, if:**

4
5 **1. The defendant was doing a lawful act in a lawful way.**

6
7 **2. The defendant was acting with usual and ordinary caution.**

8
9 **AND**

10
11 **3. The defendant was acting without any unlawful intent.**

12
13 **A person acts with *usual and ordinary caution* if he or she acts in a way that a**
14 **reasonably careful person would act in the same or similar situation.**

15
16 **The People have the burden of proving beyond a reasonable doubt that the**
17 **killing was not excused. If the People have not met this burden, you must find**
18 **the defendant not guilty of (murder/ [or] manslaughter).**

BENCH NOTES

Instructional Duty

The trial court has a **sua sponte** duty to instruct on lawful acts that excuse homicide when there is evidence supporting that defense. (See *People v. Hampton* (1929) 96 Cal.App. 157, 159–160 [court erred in refusing defendant’s requested instruction]; *People v. Slater* (1943) 60 Cal.App.2d 358, 369; *People v. Bloyd* (1987) 43 Cal.3d 333, 353–354 [instruction not required when defendant argued the victim killed herself by accident].)

When this instruction is given, it should always be given in conjunction with Instruction 756, Involuntary Manslaughter: Murder Not Charged or Instruction 755, Involuntary Manslaughter: Lesser Included Offense, unless vehicular manslaughter with ordinary negligence is charged. (*People v. Velez* (1983) 144 Cal.App.3d 558, 566–568.) A lawful act can be the basis of involuntary manslaughter, but only if that act is committed with *criminal* negligence (“lack of due caution and circumspection”). (Pen. Code, § 192(b).) The level of negligence described in this instruction, 706, is *ordinary* negligence. While proof of ordinary

negligence is sufficient to prevent a killing from being excused under Penal Code section 195, subd. 1, proof of ordinary negligence is not sufficient to find a defendant guilty of involuntary manslaughter under Penal Code section 192(b). (*People v. Penny* (1955) 44 Cal.2d 861, 879–880.)

Related Instructions

Instruction 620, Accident.

AUTHORITY

Excusable Homicide If Committed by Lawful Act ▶ Pen. Code, § 195, subd. 1.
Burden of Proof ▶ Pen. Code, § 189.5; *People v. Frye* (1992) 7 Cal.App.4th 1148, 1154–1155.

Instructing With Involuntary Manslaughter ▶ *People v. Velez* (1983) 144 Cal.App.3d 558, 566–568

Misfortune as Accident ▶ *People v. Gorgol* (1954) 122 Cal.App.2d 281, 308.

1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Defenses, § 242, p. 613.

RELATED ISSUES

Traditional Self-Defense

Self-defense and accidental homicide are mutually exclusive. A claim that a killing was accidental bars the defendant from relying on traditional self-defense not only as a defense, but also to negate implied malice. (*People v. Curtis* (1994) 30 Cal.App.4th 1337, 1358–1359.)

STAFF NOTES

Elements

Penal Code section 195 addresses excusable homicide and contains two provisions that cover situations when accidental killings are excused.

Homicide is excusable in the following cases:

1. When committed by accident and misfortune, or in doing any other lawful act by lawful means, with usual and ordinary caution, and without any unlawful intent.
2. When committed by accident and misfortune, in the heat of passion, upon any sudden and sufficient provocation, or upon a sudden combat, when no undue advantage is taken, nor any dangerous weapon used, and when the killing is not done in a cruel or unusual manner.

The present instruction is based on subdivision one.

Instruction 620, Accident and Misfortune, is based on the more general Penal Code section 26(5):

All persons are capable of committing crimes except those belonging to the following classes:

. . .

Five—Persons who committed the act or made the omission charged through misfortune or by accident, when it appears that there was no evil design, intention, or culpable negligence.

Accident and Misfortune

“‘Misfortune’ when applied to a criminal act is analogous with the word ‘misadventure’ and bears the connotation of accident while doing a lawful act.” (*People v. Gorgol* (1954) 122 Cal.App.2d 281, 308.)

Ordinary Negligence

Penal Code section 195(1) excuses homicides that occur accidentally when a lawful act is committed, “with *usual and ordinary caution*, and without any unlawful intent.” (Pen. Code, § 195(1), emphasis added.) Usual and ordinary caution “defines a civil negligence standard of conduct.” (*People v. Velez* (1983) 144 Cal.App.3d 558, 567.)

Ordinary Negligence Insufficient for Involuntary Manslaughter

“Proof of involuntary manslaughter requires a higher degree of negligence than is required to establish negligent default on a mere civil issue.” (*People v. Velez* (1983) 144 Cal.App.3d 558, 567 [citations omitted].)

Though courts have recognized that a literal reading of section 195(1) may suggest that a person could be guilty of homicide based on acts of ordinary negligence, instruction on section 195(1) has been held harmless when given together with other instructions that make clear that manslaughter requires at least criminal negligence. (*See Id.* at 692.)

Justifiable versus Excusable Homicide

The distinction between justifiable and excusable homicide was discussed in *People v. Orr* (1994) 22 Cal.App.4th 780, 784:

[I]n order to convict a person of voluntary manslaughter, the jury must find that the killing was intended and was *unlawful* in that it was *neither justifiable*, that is, did not constitute lawful defense of self, others, or property, prevention of a felony, or preservation of the peace (§ 197 . . .); *nor excusable*, that is, the killing did not result from a lawful act done by lawful means with ordinary caution and a lawful intent, and did not result from accident and misfortune under very specific circumstances, including that no dangerous weapon was used (§ 195 . . .).

707. Excusable Homicide: Accident in the Heat of Passion

1 **The defendant is not guilty of (murder/ [or] manslaughter) if (he/she) killed**
2 **someone by accident while acting in the heat of passion. Such a killing is**
3 **excused, and therefore not unlawful, if, at the time of the killing:**

4
5 **1. The defendant acted in the heat of passion.**

6
7 **2. The defendant was not the original aggressor but was (suddenly**
8 **provoked by _____ <insert name or description of decedent>/**
9 **[or] suddenly drawn into combat by _____ <insert name or**
10 **description of decedent>).**

11
12 **3. The defendant did not take undue advantage of _____ <insert**
13 **name or description of decedent>.**

14
15 **4. The defendant did not use a dangerous weapon.**

16
17 **5. The defendant did not kill _____ <insert name or description of**
18 **decedent> in a cruel or unusual way.**

19
20 **6. The defendant did not intend to kill _____ <insert name or**
21 **description of decedent> and did not act with conscious disregard of**
22 **the danger to (his/her) life.**

23
24 **AND**

25
26 **7. The defendant did not act with gross negligence.**

27
28 **A person acts *in the heat of passion* when he or she is provoked into doing a**
29 **rash act under the influence of intense emotion that obscures his or her**
30 **reasoning or judgment. The provocation must be sufficient to have caused an**
31 **ordinary and reasonable person of average disposition to act rashly and**
32 **without due deliberation, that is, from passion rather than from judgment.**

33
34 **Heat of passion does not require anger or rage. It can be any violent or**
35 **intense emotion that causes a person to act without due deliberation and**
36 **reflection.**

37
38 **In order for the killing to be excused on this basis, the defendant must have**

39 acted under the direct and immediate influence of provocation as I have
40 defined it. While no specific type of provocation is required, slight or remote
41 provocation is not sufficient.

42
43 You must decide whether the provocation was sufficient by determining how
44 an ordinarily reasonable person of average disposition would react in the
45 same situation knowing the same facts. The defendant is not allowed to set up
46 (his/her) own standard of conduct. It is not enough that the defendant was
47 actually provoked. You must also decide if an ordinarily prudent person
48 would also be provoked.

49
50 A *dangerous weapon* is any object, instrument, or weapon that is used in a
51 way capable of causing and likely to cause death or great bodily injury.

52
53 [Great bodily injury means significant or substantial physical injury.]

54
55 Gross negligence involves more than ordinary carelessness, inattention, or
56 mistake in judgment. A person acts with *gross negligence* when:

- 57
58 1. He or she acts in a way that creates a high risk of death or great
59 bodily injury.

60
61 AND

- 62
63 2. A reasonable person would have known that acting in that way
64 would create such a risk.

65
66 In other words, a person acts with gross negligence when the way he or she
67 acts is so different from how an ordinarily careful person would act in the
68 same situation that his or her act amounts to disregard for human life or
69 indifference to the consequences of that act.

70
71 The People have the burden of proving beyond a reasonable doubt that the
72 killing was not excused. If the People have not met this burden, you must find
73 the defendant not guilty of (murder/ [or] manslaughter).

BENCH NOTES

Instructional Duty

The trial court has a **sua sponte** duty to instruct on accident and heat of passion that excuses homicide when there is evidence supporting the defense. (*People v.*

Hampton (1929) 96 Cal.App. 157, 159–160 [court erred in refusing defendant’s requested instruction].)

Related Instructions

Instruction 706, Excusable Homicide: Accident.

Instruction 691, Right to Self-Defense: Mutual Combat or Initial Aggressor.

Instruction 750, Voluntary Manslaughter: Heat of Passion.

AUTHORITY

Excusable Homicide If Committed in Heat of Passion ▶ Pen. Code, § 195, subd. 2. Burden of Proof ▶ Pen. Code, § 189.5; *People v. Frye* (1992) 7 Cal.App.4th 1148, 1154–1155.

Deadly Weapon Defined ▶ See *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029.

1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Defenses, § 242, p. 613; Crimes Against the Person, § 212, p. 823.

RELATED ISSUES

Distinguished From Voluntary Manslaughter

Under Penal Code section 195, subd. 2, a homicide is “excusable,” “in the heat of passion” if done “by accident,” or on “sudden . . . provocation . . . or . . . combat.” (Pen. Code, § 195, subd. 2.) Thus, unlike voluntary manslaughter, the killing must have been committed without criminal intent, that is, accidentally. (See *People v. Cooley* (1962) 211 Cal.App.2d 173, 204; Pen. Code, § 195, subd. 1 [act must be without criminal intent]; Pen. Code, § 26, subd. 5 [accident requires absence of “evil design [or] intent”].) The killing must also be on “sudden” provocation, eliminating the possibility of provocation over time, which may be considered in cases of voluntary manslaughter. (See Bench Notes to Instruction 750, Voluntary Manslaughter: Heat of Passion.)

Distinguished From Involuntary Manslaughter

Involuntary manslaughter requires a finding of gross or criminal negligence. (See Bench Notes to Instruction 756, Involuntary Manslaughter: Murder Not Charged; Pen. Code, § 26, subd. 5 [accident requires no “culpable negligence”].)

STAFF NOTES

Elements

Penal Code section 195(2) provides:

Homicide is excusable in the following cases:

...

2. When committed by accident and misfortune, in the heat of passion, upon any sudden and sufficient provocation, or upon a sudden combat, when no undue advantage is taken, nor any dangerous weapon used, and when the killing is not done in a cruel or unusual manner.

“Heat of Passion” Accidental Killings

CALJIC No. 5.01 adds two additional elements not found in the statute: (1) the person claiming the defense cannot be the original aggressor, and (2) the killing was not grossly negligent. Our instruction 708, Right to Self-Defense: Mutual Combat or Initial Aggressor, covers the right of an initial aggressor to use self-defense under Penal Code section 197(3). We did not locate any direct authority supporting the element that the killing was not grossly negligent.

Instruction 620, Accident and Misfortune, is based on the more general Penal Code section 26(5):

All persons are capable of committing crimes except those belonging to the following classes:

...

Five—Persons who committed the act or made the omission charged through misfortune or by accident, when it appears that there was no evil design, intention, or culpable negligence.

Section 26 permits the defense for any accidental killings where no unlawful intent or criminal negligence exists. Section 195(2) also addresses accidental killings but includes other requirements to establish the defense, i.e., no dangerous weapons, no cruelty, etc.

Because gross negligence would make the killing involuntary manslaughter (and thus, “culpable”), the element is appropriate.

Sufficiently Provoked by Victim

The sufficiency of provocation, in the context voluntary manslaughter, is discussed in *People v. Breverman* (1998) 19 Cal.4th 142, 163:

An intentional, unlawful homicide is “upon a sudden quarrel or heat of passion” (§ 192(a)) and is thus voluntary manslaughter (*ibid.*), if the killer's reason was actually obscured as the result of a strong passion aroused by a “provocation” sufficient to cause an “ ‘ordinary [person] of average disposition ... to act rashly or without due deliberation and reflection, and from this passion rather than judgment.’ ” . . . [T]he passion aroused need not be anger or rage, but can be any “ ‘[v]iolent, intense, high-wrought or enthusiastic emotion’ ” [citations] other than revenge [citation].

The victim must provoke the killer, as discussed, in the context of voluntary manslaughter, in *People v. Lujan* (2001) 92 Cal.App.4th 1389, 1411–1412:

[T]he provocation which incites the killer to act in the heat of passion case must be caused by the victim or reasonably believed by the accused to have been engaged in by the decedent.

Undue Advantage

In *People v. Perdue* (1874) 49 Cal.425, 428, the court found that “there was evidence . . . tending to prove that an undue advantage was taken of the deceased . . . within the meaning of the statute . . .” The defendant continued to viciously kick the deceased in the back after the deceased had fallen and cried out he had had enough. (See also *People v. Lee* (1999) 20 Cal.4th 47, 60, fn. 16 [dicta in manslaughter case that defendant took undue advantage by using gun following mutual shoving].)

Dangerous Weapon

A deadly weapon is defined, in the context of battery, in *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029:

As used in section 245, subdivision (a)(1), a “deadly weapon” is “any object, instrument, or weapon which is used in such a manner as to be capable of producing and likely to produce, death or great bodily injury. (citations omitted)

See Instruction 875, Assault With a Deadly Weapon or Force Likely to Produce Great Bodily Injury, which defines “deadly weapon.”

708. Presumption of Lawful Killing

1 **The law presumes that a killing is lawful if the person killed dies more than**
2 **three years and one day from the day of the incident that caused the death.**
3
4 **The People must overcome this presumption by proving that the killing was**
5 **not lawful. If you have a reasonable doubt whether the killing was lawful, you**
6 **must find the defendant not guilty.**
7
8 **[To count the three year and one day period, begin with the day on which the**
9 **incident happened. Count that day as one whole day regardless of what time**
10 **the incident happened.]**

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on presumptions relevant to the issues of the case. (See *People v. Hood* (1969) 1 Cal.3d 444, 449.)

AUTHORITY

Presumption of Lawful Killing ▶ Pen. Code, § 194.

Rebuttable Presumptions Affecting Burden of Proof ▶ Evid. Code, §§ 601, 604, 606.

1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes-Pers, § 93.

RELATED ISSUES

May Prosecute Defendant for Attempted Murder and Murder

Double jeopardy does not preclude prosecution of the defendant for attempted murder and also for murder if the victim dies after the conviction for attempted murder. (*In re Saul S.* (1985) 167 Cal.App.3d 1061, 1068.)

STAFF NOTES

Statute

Penal Code section 194 states:

To make the killing either murder or manslaughter, it is not requisite that the party die within three years and a day after the stroke received or the cause of death administered. If death occurs beyond the time of three years and a day, there shall be a rebuttable presumption that the killing was not criminal. The prosecution shall bear the burden of overcoming this presumption. In the computation of time, the whole of the day on which the act was done shall be reckoned the first.

709. Voluntary Intoxication: Effects on Homicide Crimes

1 **You may consider evidence, if any, of (a/the) defendant’s intoxication only in**
2 **a limited way. You may consider that evidence only in deciding whether**
3 **(a/the) defendant acted with an intent to kill[,] [and] [whether (a/the)**
4 **defendant acted with deliberation and premeditation[,] [[and] whether the**
5 **defendant was unconscious when (he/she) acted[,] [and whether the**
6 **defendant _____** *<insert other specific intent required in a homicide*
7 *charge or other charged offense>.*
8

9 **A person is voluntarily intoxicated if he or she willingly uses any intoxicating**
10 **drug, drink, or other substance knowing that it could produce an intoxicating**
11 **effect.**
12

13 **You may not consider evidence of intoxication for any other purpose.**

BENCH NOTES

Instructional Duty

With the statutory elimination of diminished capacity as a defense, there is no sua sponte duty to instruct on the effect of voluntary intoxication on the mental states required for homicide. (Pen. Code, § 28(b); *People v. Saille* (1991) 54 Cal.3d 1103, 1119–1120.) However, subsequent cases affirm that voluntary intoxication can be used to negate an element of the crime that must be proven by the prosecution. (*People v. Reyes* (1997) 52 Cal.App.4th 975, 982; *People v. Visciotti* (1992) 2 Cal.4th 1, 56–57.) Such an instruction is a “pinpoint” instruction, which must be given on request when there is sufficient evidence supporting the theory. (*People v. Saille, supra*, 54 Cal.3d at p. 1120.)

Include the bracketed language regarding unconsciousness if the court also gives Instruction 710, Voluntary Intoxication Causing Unconsciousness.

If the defendant is charged with a homicide crime that has as an element an additional specific intent requirement other than intent to kill, include the required intent in the last bracketed portion of the second sentence. For example, if the defendant is charged with torture murder, include “whether the defendant intended to inflict extreme and prolonged pain.” Similarly, if the defendant is also charged with a non-homicide crime with a specific intent requirement, include that intent requirement in the last bracketed clause of the first paragraph. For example, if the

defendant is charged with murder and robbery, include “whether the defendant intended to take property by force or fear.”

AUTHORITY

Voluntary Intoxication Defined ▶ Pen. Code, § 22(c).
Unconsciousness Not Required ▶ *People v. Ray* (1975) 14 Cal.3d 20, 28–29.
No Sua Sponte Duty to Instruct ▶ *People v. Saille* (1991) 54 Cal.3d 1103, 1120.
Evidence of Intoxication Inapplicable to Implied Malice ▶ Pen. Code, § 22(b).
Criminal Negligence ▶ *People v. Penny* (1955) 44 Cal.2d 861, 879–880; *People v. Rodriguez* (1960) 186 Cal.App.2d 433, 440.
Applies to Attempted Murder ▶ *People v. Castillo* (1997) 16 Cal.4th 1009, 1016.

1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Defenses, §§ 26–30.

RELATED ISSUES

General Instruction on Voluntary Intoxication

This instruction is a specific application of Instruction 650, Voluntary Intoxication, to homicide.

Unconsciousness

Unconsciousness (as defined in Instruction 640, Unconsciousness) is not required. (*People v. Ray* (1975) 14 Cal.3d 20, 28–29.)

Not Applicable in Murder Cases Based Exclusively on Implied Malice

This instruction is inapplicable to cases where the murder charge is exclusively based on a theory of *implied* malice, because voluntary intoxication can only negate *express* malice. (Pen. Code, § 22(b).) Drunk-driving second degree murder is one type of case that is typically based exclusively on an implied malice theory.

STAFF NOTES

Statutory Authority

Reduction of homicide charges based on voluntary intoxication is a creation of case law. However, the doctrine has been limited by statute in Penal Code section 22(b):

Evidence of voluntary intoxication is admissible solely on the issue of whether or not the defendant actually formed a required specific intent, or, when charged with murder, whether the defendant premeditated, deliberated, or harbored express malice aforethought.

Rationale for Including this Instruction

Current law holds that the jury may consider voluntary intoxication but may only consider it in the context of negating an element of the crime that must be proved by the prosecution. (*People v. Reyes* (1997) 52 Cal.App.4th 975, 982; *People v. Visciotti* (1992) 2 Cal.4th 1, 56-57.) This general principle has traditionally been expressed in a general instruction that indicates that voluntary intoxication can negate specific intent or other special mental states required for a crime, as in Instruction 650. This instruction applies this general principle to the specific mental states in homicide law, an area that has resulted in instructional error in the past.

Definition of Voluntary Intoxication

The definition of “voluntary intoxication” is adapted from Penal Code section 22(c): “Voluntary intoxication includes the voluntary ingestion, injection, or taking by any other means of any intoxicating liquor, drug, or other substance.”

Effect of Voluntary Intoxication on First Degree Murder Premeditation and Deliberation

“[D]eliberation and premeditation [are] ‘mental states’ for which [a jury] should consider the evidence of intoxication as to either attempted murder or murder.” (*People v. Castillo* (1997) 16 Cal.4th 1009, 1016.)

Unconsciousness Not Required

“The critical factor in distinguishing the degrees of a homicide is thus the perpetrator’s mental state. If a diminished capacity renders him incapable of entertaining either malice or an intent to kill, then his offense is mitigated to a lesser crime. Although a finding that the perpetrator was unconscious would establish the ultimate facts that the perpetrator lacked both the ability to entertain malice and an intent to kill, the absence of either or both of such may nevertheless

be found even though the perpetrator's mental state had not deteriorated into unconsciousness." (*People v. Ray* (1975) 14 Cal.3d 20, 28.)

No Sua Sponte Duty to Instruct

"The withdrawal of diminished capacity as a defense removes intoxication from the realm of defenses to crimes. Intoxication is now relevant only to the extent that it bears on the question of whether the defendant actually had the requisite specific mental state. Thus it is now more like the "pinpoint" instructions discussed in *People v. Sears* [citation] and *People v. Rincon-Pineda* [citation], to which a defendant is entitled upon request. [. . .] They are required to be given upon request when there is evidence supportive of the theory, but they are not required to be given sua sponte." (*People v. Saille* (1991) 54 Cal.3d 1103, 1119.)

Evidence Of Voluntary Intoxication Applicable Only To Express Malice

"Evidence of voluntary intoxication is admissible solely on the issue of whether or not the defendant actually formed a required specific intent, or, when charged with murder, whether the defendant premeditated, deliberated, or harbored express malice aforethought." (Pen. Code, § 22(b).)

Inapplicability to Drunk Driving Second Degree Murder

The revision to Penal Code section 22(b) has categorically made evidence of voluntary intoxication inadmissible for negating implied malice. (See *People v. Reyes* (1997) 52 Cal.App.4th 975, 984 n. 6.) Drunk driving second degree murder cases are typically based exclusively on implied malice. This instruction is not appropriate in such cases.

710. Voluntary Intoxication Causing Unconsciousness:
Effects on Homicide Crimes

1 **Voluntary intoxication may cause a person to be unconscious of his or her**
2 **actions. A very intoxicated person may still be capable of physical movement**
3 **but may not be aware of his or her actions or the nature of those actions.**
4

5 **A person is voluntarily intoxicated if he or she willingly uses any intoxicating**
6 **drug, drink, or other substance knowing that it could produce an intoxicating**
7 **effect.**
8

9 **When a person voluntarily causes his or her own intoxication to the point of**
10 **unconsciousness, the person assumes the risk that while unconscious he or she**
11 **will commit acts inherently dangerous to human life. If someone dies as a**
12 **result of the actions of a person who was unconscious due to voluntary**
13 **intoxication, then the killing is involuntary manslaughter.**
14

15 **Involuntary manslaughter has been proved if you find beyond a reasonable**
16 **doubt that:**
17

- 18 **1. The defendant killed without legal justification or excuse.**
19
- 20 **2. The defendant did not act with the intent to kill.**
21
- 22 **3. The defendant did not act with a conscious disregard for human**
23 **life.**
24

25 **AND**
26

- 27 **4. As a result of voluntary intoxication, the defendant was not**
28 **conscious of (his/her) actions or the nature of those actions.**
29

30 **The People have the burden of proving beyond a reasonable doubt that the**
31 **defendant was not unconscious. If the People have not met this burden, you**
32 **must find the defendant not guilty of (murder/ [or] voluntary manslaughter).**

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on voluntary intoxication causing unconsciousness if there is evidence to support this finding. (*People v. Graham* (1969) 71 Cal.2d 303, 316 [partially abrogated by Pen. Code, § 22(c)]; *People v. Ochoa* (1998) 19 Cal.4th 353, 423–424.) However, the court may properly refuse to give this instruction when the evidence shows that the defendant acted with malice before becoming intoxicated. (*People v. Whitfield* (1994) 7 Cal.4th 437, 455 [partially abrogated by amendments to Pen. Code, § 22(a)].)

In *People v. Ochoa* (1998) 19 Cal.4th 353, 423–424, the court stated,

[I]f the state of unconsciousness results from intoxication voluntarily induced . . . it is not a complete defense. If the intoxication is voluntarily induced, it can never excuse homicide. . . . [The] requisite element of criminal negligence is deemed to exist irrespective of unconsciousness, and a defendant stands guilty of involuntary manslaughter if he voluntarily procured his own intoxication.

The committee has chosen not to include the phrase “criminal negligence is deemed to exist” because the committee concluded that this unnecessarily complicates the issue for the jury.

AUTHORITY

Definition of Voluntary Intoxication ▶ Pen. Code, § 22(c).

Presumption of Criminal Negligence ▶ *People v. Graham* (1969) 71 Cal.2d 303, 317, fn. 4 [partially abrogated by Pen. Code, § 22(c)].

Malice Preceded Intoxication ▶ *People v. Whitfield* (1994) 7 Cal.4th 437, 455 [partially abrogated by amendments to Pen. Code, § 22(a)].

Criminal Negligence ▶ *People v. Penny* (1955) 44 Cal.2d 861, 879–880; *People v. Rodriguez* (1960) 186 Cal.App.2d 433, 440.

1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes-Pers, § 226.

RELATED ISSUES

Unconsciousness Does Not Require Inability to Move

“[U]nconsciousness can exist where the subject physically acts in fact but is not, at the time, conscious of acting.” (*People v. Ochoa* (1998) 19 Cal.4th 353, 424)

[citations and internal quotation marks omitted]; see also *People v. Hughes* (2002) 27 Cal.4th 287, 343–344.)

Malice Preceded Intoxication: Drunk Driving

In a case in which the defendant was convicted of second degree murder following a fatal drunk driving accident, the trial court properly refused to give an unconsciousness instruction where the defendant's long history of drinking and driving established that he acted with malice prior to becoming intoxicated. (*People v. Whitfield* (1994) 7 Cal.4th 437, 455 [partially abrogated by amendments to Pen. Code, § 22(a)].)

STAFF NOTES

Statutory Authority

Penal Code section 26 states, in relevant part:

All persons are capable of committing crimes except those belonging to the following classes: [. . .] Four--Persons who committed the act charged without being conscious thereof.

Definition of Voluntary Intoxication

The definition of “voluntary intoxication” is adapted from Penal Code section 22(c): “Voluntary intoxication includes the voluntary ingestion, injection, or taking by any other means of any intoxicating liquor, drug, or other substance.”

Presumption of at Least Criminal Negligence for Acts Committed While Voluntarily Intoxicated

When a person renders himself or herself unconscious through voluntary intoxication and kills in that state, the killing is attributed to his or her negligence in self-intoxicating to that point, and is treated as involuntary manslaughter. Unconsciousness is ordinarily a complete defense to a charge of criminal homicide. If the state of unconsciousness results from intoxication voluntarily induced, however, it is not a complete defense. If the intoxication is voluntarily induced, it can never excuse homicide. Thus, the requisite element of criminal negligence is deemed to exist irrespective of unconsciousness, and a defendant stands guilty of involuntary manslaughter if he voluntarily procured his own intoxication. Unconsciousness for this purpose need not mean that the actor lies still and unresponsive: [Penal Code] section 26 describes as “[in]capable of committing crimes [. . .] [p]ersons who *committed the act . . . without being conscious thereof.*” (Italics added.) Thus unconsciousness can exist . . . where the subject physically acts in fact but is not, at the time, conscious of acting.

(*People v. Ochoa* (1998) 19 Cal.4th 353, 423-24 [citations and quotations marks omitted]; *People v. Graham* (1969) 71 Cal.2d 303, 317 n.4.)

Unconsciousness as a result of voluntary intoxication remains a defense following amendments to Penal Code section 22. (See *People v. Hughes* (2002) 27 Cal.4th 287, 343-44.)

In *People v. Graham* (1969) 71 Cal.2d 303, 317 n.4, the court required that the following instruction be given on remand:

If you find that the defendant killed while unconscious as a result of voluntary intoxication and was therefore unable to formulate a specific intent to kill or to harbor malice, his killing is involuntary manslaughter. When a man voluntarily induces his own intoxication to the point of unconsciousness, he assumes the risk that while unconscious he will commit acts inherently dangerous to life and limb. Under such circumstances, the law implies criminal negligence.

Malice Preceded Intoxication: Drunk Driving

In a case in which the defendant was convicted of second degree murder following a fatal drunk driving accident, the trial court properly refused to give an unconsciousness instruction where the defendant's long history of drinking and driving established that he acted with malice prior to becoming intoxicated. (*People v. Whitfield* (1994) 7 Cal.4th 437, 455 [partially abrogated by amendments to Pen. Code, § 22(a)].) "Because defendant knowingly embarked upon such an extremely dangerous course of conduct with conscious disregard of the danger, his malice aforethought would not be negated simply by reason of his having succeeded in rendering himself unconscious prior to the fatal collision." (*Ibid.*)

711. Hallucination Defense

1 **A hallucination is a perception not based on objective reality. In other words,**
2 **a person has a hallucination when that person believes that he or she is seeing**
3 **or hearing [or otherwise perceiving] something that is not actually present or**
4 **happening.**

5
6 **You may consider evidence of hallucinations, if any, in deciding whether the**
7 **defendant acted with deliberation and premeditation.**

8
9 **The People have the burden of proving beyond a reasonable doubt that the**
10 **defendant acted with deliberation and premeditation. If the People have not**
11 **met this burden, you must find the defendant not guilty of first degree**
12 **murder.**

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give instructions supported by substantial evidence and not inconsistent with the defendant's theory of the case. (See *People v. Baker* (1999) 74 Cal.App.4th 243, 252; *People v. Barton* (1995) 12 Cal.4th 186, 195.)

"[E]vidence of a hallucination—a perception with no objective reality—is inadmissible to negate malice so as to mitigate murder to voluntary manslaughter but is admissible to negate deliberation and premeditation so as to reduce first degree murder to second degree murder." (*People v. Padilla* (2002) 103 Cal.App.4th 675, 677.)

AUTHORITY

Hallucination Evidence ► *People v. Padilla* (2002) 103 Cal.App.4th 675, 677.

RELATED ISSUES

Imperfect Self-Defense

The *Padilla* court did not rule on whether evidence of hallucinations may be used to establish imperfect self-defense. (*People v. Padilla* (2002) 103 Cal.App.4th

675, 678.) There is a split of authority on whether delusions may be used to establish imperfect self-defense. (*People v. Wright* (2003) 110 Cal. App. 4th 1594 [2 Cal. Rptr. 3d 903] [can be used, REVIEW GRANTED and DEPUBLISHED Nov. 12, 2003—S119067]; *People v. Gregory* (2002) 101 Cal.App.4th 1149, 1172 [124 Cal.Rptr.2d 776, 793] [cannot be used, REVIEW GRANTED and DEPUBLISHED Nov. 26, 2002—S110450].

690. Right to Self-Defense or Defense of Another (Non-Homicide)

The defendant is not guilty of _____ *<insert crime(s) charged>* if (he/she) used force against the other person in lawful (self-defense/defense of another). The defendant acted in lawful (self-defense/defense of another) if:

1. The defendant reasonably believed that (he/she/someone else/_____ *<insert name of third party>*) was in danger of suffering bodily injury [or was in danger of being _____ *<insert crime>*].

2. The defendant reasonably believed that (he/she/the other person) would be harmed immediately.

3. The defendant reasonably believed that the use of force was necessary to defend against the threatened harm.

AND

4. The defendant used no more force than (he/she) reasonably believed was necessary.

Belief in future harm is not sufficient, no matter how great or how likely the harm is believed to be. The defendant must have believed there was immediate danger of violence to (himself/herself/someone else). Defendant's belief must have been reasonable and (he/she) must have acted only because of that belief. The defendant is entitled to use only that amount of force that a reasonable person would believe is necessary in the same situation. If the defendant used more force than was reasonable, then the defendant did not act in lawful (self-defense/defense of another).

When deciding whether the defendant's beliefs were reasonable, consider all the circumstances as they were known to and appeared to the defendant and consider what a reasonable person in a similar situation with similar knowledge would have believed. If the defendant's beliefs were reasonable, the danger does not need to have actually existed.

[The defendant's belief that (he/she/someone else) was threatened may be reasonable even if (he/she) relied on information that was not true. However, the

defendant must actually and reasonably have believed that the information was true.]

[If you find that _____<insert name of victim> threatened or harmed the defendant in the past, you may consider that information in deciding whether the defendant's conduct and beliefs were reasonable.]

[If _____<insert name of victim> threatened or harmed the defendant in the past, the defendant may have been justified in acting more quickly or taking greater self-defense measures than if there had been no earlier threat or harm.]

[If you find that the defendant knew that _____<insert name of victim> had threatened or harmed others in the past, you may consider that information in deciding whether the defendant's conduct and beliefs were reasonable.]

[If the defendant received a threat from someone else that (he/she) reasonably associated with _____<insert name of victim>, you may consider that threat in deciding whether the defendant was justified in acting in self-defense.]

[A defendant is not required to retreat. He or she is entitled to stand his or her ground and defend himself or herself and, if reasonably necessary, to pursue an assailant until the danger of (death/bodily injury/ _____<insert crime>) has passed. This is so even if safety could have been achieved by retreating.]

The People have the burden of proving beyond a reasonable doubt that the defendant did not act in lawful (self-defense/defense of another). If the People have not met this burden, you must find the defendant not guilty of _____<insert crime(s) charged>.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on self-defense when “it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant’s theory of the case.” (See *People v. Breverman* (1998) 19 Cal.4th 142, 157 [discussing duty to instruct on defenses generally]; see also *People v. Lemus* (1988) 203 Cal.App.3d 470, 478 [if substantial evidence of self-defense exists, court must instruct sua sponte and let jury decide credibility of witnesses].)

If there is substantial evidence of self-defense that is inconsistent with the defendant's testimony, the court must ascertain whether the defendant wants an instruction on self-defense. (*People v. Breverman*, *supra*, 19 Cal.4th at p. 156.) The court is then required to give the instruction if the defendant so requests. (*People v. Elize* (1999) 71 Cal.App.4th 605, 611–615.)

On defense request and when supported by sufficient evidence, the court must instruct that the jury may consider the effect of “antecedent threats and assaults against the defendant on the reasonableness of defendant's conduct.” (*People v. Garvin* (2003) 110 Cal.App.4th 484, 488.) The court must also instruct that the jury may consider previous threats or assaults by the aggressor against someone else or threats received by the defendant from a third party that the defendant reasonably associated with the aggressor (See *People v. Pena* (1984) 151 Cal.App.3d 462, 475; *People v. Minifie* (1996) 13 Cal.4th 1055, 1065, 1068; see also Instruction 701, Justifiable Homicide: Self-Defense or Defense of Another.)

Related Instructions

Instruction 701, Justifiable Homicide: Self-Defense or Defense of Another.

Instruction 691, Right to Self-Defense: Mutual Combat or Initial Aggressor.

Instruction 692, Right to Self-Defense: May Not Be Contrived.

Instruction 693, Right to Self-Defense: Escalation to Deadly Force.

Instruction 931, Testimony on Battered Women's Syndrome: Offered by the Defense.

AUTHORITY

Instructional Requirements ▶ *People v. Moody* (1943) 62 Cal.App.2d 18; *People v. Myers* (1998) 61 Cal.App.4th 328, 335, 336.

Lawful Resistance ▶ Pen. Code, §§ 692, 693, 694; Civ. Code, § 50.

Burden of Proof ▶ Pen. Code, § 189.5; *People v. Banks* (1976) 67 Cal.App.3d 379, 383–384.

Elements ▶ *People v. Humphrey* (1996) 13 Cal.4th 1073, 1082.

Imminence ▶ *People v. Aris* (1989) 215 Cal.App.3d 1178, 1187.

No Duty to Retreat ▶ *People v. Hughes* (1951) 107 Cal.App.2d 487, 493; *People v. Hatchett* (1942) 56 Cal.App.2d 20, 22.

Reasonable Belief ▶ *People v. Humphrey* (1996) 13 Cal.4th 1073, 1082; *People v. Clark* (1982) 130 Cal.App.3d 371, 377.

1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Defenses, §§ 65, 66, 69, 70, pp. 400–401, 404–406.

RELATED ISSUES

Brandishing Weapon in Defense of Another

The defense of others is a defense to a charge of brandishing a weapon under Penal Code section 417(a)(2). (*People v. Kirk* (1986) 192 Cal.App.3d Supp. 15, 19.)

Ex-Felon in Possession of Weapon

“[W]hen [an ex-felon] is in imminent peril of great bodily harm or . . . reasonably believes himself or others to be in such danger, and without preconceived design on his part a firearm is made available to him, his temporary possession of that weapon for a period no longer than that in which the necessity or apparent necessity to use it in self-defense continues, does not violate [Penal Code] section 12021. . . . [T]he use of the firearm must be reasonable under the circumstances and may be resorted to only if no other alternative means of avoiding the danger are available.” (*People v. King* (1978) 22 Cal.3d 12, 24, 26 [error to refuse instructions on self-defense and defense of others].)

STAFF NOTES

Self-Defense Against Assault

Penal Code section 692 provides:

Lawful resistance to the commission of a public offense may be made:

1. By the party about to be injured;
2. By other parties.

Penal Code section 693 provides:

Resistance sufficient to prevent the offense may be made by the party about to be injured:

1. To prevent an offense against his person, or his family, or some member thereof.
2. To prevent an illegal attempt by force to take or injure property in his lawful possession.

Penal Code section 694 provides:

Any other person, in aid or defense of the person about to be injured, may make resistance sufficient to prevent the offense.

Civil Code section 50 authorizes the use of necessary force to defend person or property:

Any necessary force may be used to protect from wrongful injury the person or property of oneself, or of a wife, husband, child, parent, or other relative, or member of one's family, or of a ward, servant, master, or guest.

Reasonable Person Test

People v. Moody (1943) 62 Cal.App.2d 18:

In a prosecution of one who pleads that his act was done in self-defense it is error to instruct the jury that in resisting his assailant the defendant might use any force he deemed necessary; but they should be told that the sole test is whether the force exerted by the defendant would have been deemed necessary to insure his safety by a reasonable person similarly situated. . . . The right to make a counter-assault and the extent thereof depend upon the existence or apparent existence of such conditions as would be deemed sufficient by a reasonable man under a similar situation. (Secs. 692, 693, Penal Code.)

People v. Dollor (1891) 89 Cal. 513, 515:

“Necessary self-defense,” . . . *includes* every case where “there is reasonable ground to apprehend a design to commit a felony or to do some great bodily injury,” and where the circumstances are “sufficient to excite the fears of a reasonable man.”

People v. Semikoff (1934) 137 Cal.App. 373, 376:

[T]he force that may be used under such circumstances is not such as a party may deem necessary but is such as is reasonable under the circumstances. The force that may be used is limited by whether reasonable grounds exist for believing it necessary, and the test is whether the force used would have been deemed necessary by a reasonable person in a similar situation.

Imminent Commission

People v. Martin (1910) 13 Cal.App. 96, 103:

[W]hile the statute of this state recognizes and sanctions the right of self-defense against an aggressor, the right can only be exercised to prevent an imminent danger or an offense about to be committed. . . . “Lawful resistance to the commission of a public offense may be made: 1. By the party about to be injured.” (Pen. Code, 692.)

See also *People v. Minifie* (1996) 13 Cal.4th 1055, 1065 [dicta]:

“To justify an act of self-defense for [an assault charge under Penal Code section 245], the defendant must have an honest *and reasonable* belief that bodily injury is about to be inflicted on him.” . . . The threat of bodily injury must be imminent . . . , and “. . . any right of self-defense is limited to the use of such force as is reasonable under the circumstances.”

Threat of Offensive Touching Without Bodily Harm

People v. Myers (1998) 61 Cal.App.4th 328, 335:

[A]n offensive touching, although it inflicts no bodily harm, may nonetheless constitute a battery, which the victim is privileged to resist with such force as is reasonable under circumstances.

Appearance of Danger

People v. Jackson (1965) 233 Cal.App.2d 639, 641–642:

This instruction does not embrace the doctrine of appearances. [. . .] “Justification does not depend on the existence of actual danger but on appearances.” [. . .] “[I]t is well established that reasonably apparent danger, as distinguished from actual danger, may be sufficient to justify a killing in self-defense.” [. . .] Defendant’s entire defense was based upon self-defense and the doctrine of appearances was vital to that issue. We have concluded that the refusal of the trial court to instruct on such doctrine, particularly when requested by defendant to do so, constitutes prejudicial error.

691. Right to Self-Defense: Mutual Combat or Initial Aggressor

1 **A person who engages in mutual combat or who starts a fight has a right to**
2 **self-defense only if:**

3
4 **1. (He/She) actually and in good faith tries to stop fighting.**

5
6 **[AND]**
7

8 **2. (He/She) indicates, by word or by conduct, to (his/her) opponent, in a**
9 **way that a reasonable person would understand, that (he/she) wants to**
10 **stop fighting and that (he/she) has stopped fighting.**

11
12 **[AND]**
13

14 **3. (He/She) gives (his/her) opponent a chance to stop fighting.]**
15

16 **If a person meets these requirements, (he/she) has a right to self-defense if the**
17 **opponent then continues to fight.**

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give instructions supported by the evidence and not inconsistent with the defendant's theory of the case. (*People v. Baker* (1999) 74 Cal.App.4th 243, 252; *People v. Barton* (1995) 12 Cal.4th 186, 195.)

Give bracketed element 3 if the person claiming self-defense was engaged in mutual combat.

If the evidence suggests that the defendant participated in a simple assault that the opponent escalated into the use of deadly force, give Instruction 693, Right to Self-Defense: Escalation to Deadly Force.

If the defendant was the initial aggressor and is charged with homicide, always give Instruction 701, Justifiable Homicide: Self-Defense or Defense of Another, in conjunction with this instruction.

AUTHORITY

Instructional Requirements ▶ See Pen. Code, § 197, subd. 3; *People v. Button* (1895) 106 Cal. 628, 633; *People v. Crandell* (1988) 46 Cal.3d 833, 871–872; *People v. Sawyer* (1967) 256 Cal.App.2d 66, 75.

1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Defenses, § 75, pp. 409–410.

RELATED ISSUE

Simple Assault Escalated to Deadly Force

Simple assault does not justify the use of deadly force, but a defendant may defend himself or herself with deadly force if the opponent escalates to deadly force. (See *People v. Sawyer* (1967) 256 Cal.App.2d 66, 75; *People v. Hecker* (1895) 109 Cal. 451, 464; *People v. Anderson* (1922) 57 Cal.App. 721, 727; see also Instruction 693, Right to Self-Defense: Escalation to Deadly Force.)

STAFF NOTES

“Clearly Informed”--Error

In the recent case of *People v. Hernandez* (2003) 2003 Cal.App. LEXIS 1282, the court held that it was error to instruct the jury that the initial aggressor must “clearly inform” the other party that he or she is withdrawing. The court stated:

Defendant is correct that an original aggressor may communicate withdrawal either by words or by conduct. The ultimate source of the communication requirement is *People v. Button* (1895) 106 Cal. 628 [Citations.] In *Button*, the Supreme Court held: "In order for an assailant to justify the killing of his adversary, he must not only endeavor to really and in good faith withdraw from the combat, but he must make known his intentions to his adversary." (*Button* at p. 632.) " ... 'A man who assails another with a deadly weapon cannot kill his adversary in self-defense until he has fairly notified him *by his conduct* that he has abandoned the contest'" (*Id.* at p. 633, italics added, quoting *State v. Smith* (1875) 10 Nev. 106, 119.) The court also held that: "[I]n considering this question, the assailed must be deemed a man of ordinary understanding If the subsequent *acts* of the attacking party be such as to indicate to a reasonable man that he in good faith has withdrawn from the combat, they must be held to so indicate to the party attacked." (*Button.* at p. 633, italics added.)

The challenged instructions were at least ambiguous on this point. "If a jury instruction is ambiguous, we inquire whether there is a reasonable likelihood that the jury misunderstood and misapplied the instruction. [Citations.]" (*People v. Smithey* (1999) 20 Cal.4th 936, 963 [86 Cal. Rptr. 2d 243, 978 P.2d 1171].) Arguably, a requirement that an attacker "inform" an opponent of his or her withdrawal could be met by either a verbal or a nonverbal communication. It would *not* seem, however, to be met by actions that simply *constitute* withdrawal. For example, the conduct that most obviously demonstrates withdrawal is running away. Most of us, however, would not consider running away from a fight to be "communicating" or "informing" one's opponent of anything. Thus, there is at least a reasonable likelihood that the jury misunderstood the instruction as requiring at least an intent to communicate, and perhaps even a verbal form of communication.

(*Id.* at p. 11-12.)

Non-Deadly Force

Both the controlling statute and case law refer to deadly force that results in homicide. However, one case approves giving the substantially similar initial aggressor instruction in the context of assault with a deadly weapon. (*People v. Wittig* (1984) 158 Cal.App.3d 124, 136.) Accordingly, the committee inferred that these principles apply to non-deadly combat as well.

Elements

Element 1 comes from Pen. Code section 197, subd. 3: [Homicide is also justifiable when committed by] “such person . . . if he . . . engaged in mutual combat, must really and in good faith have endeavored to decline any further struggle before the homicide was committed.”

Element 2 is taken from Cal. Pen. Code section 197, subd. 3, and the *Crandell* and *Button* cases: “An aggressor who uses deadly force must ‘not only endeavor to really and in good faith withdraw from the combat, but he must make known his intentions to his adversary.’” (*People v. Crandell* (1988) 46 Cal.3d 833, 871; *People v. Button* (1895) 106 Cal. 628, 632.) Item 2 also paraphrases “make known his intentions to his adversary.”

Element 2 is also based on the standard articulated in *People v. Button* (1895) 106 Cal. 628, 633:

[T]he assailed must be deemed a man of ordinary understanding; he must be gauged and tested by the common rule – a reasonable man; his acts and conduct must be weighed and measured in the light of that test, for such is the test applied wherever the right of self-defense is an issue. His naturally demented condition will not excuse him from seeing that his assailant has withdrawn from the attack in good faith. Neither his passion nor his cowardice will be allowed to blind him to the fact that his assailant is running away, and all danger is over. If the subsequent acts of the attacking party be such as to indicate to a reasonable man that he in good faith has withdrawn from the combat, they must be held to so indicate to the party attacked.

692. Right to Self-Defense: May Not Be Contrived

- 1 **A person does not have the right to self-defense if he or she provokes a fight**
2 **or quarrel with the intent to create an excuse to use force.**
-

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give instructions supported by the evidence and not inconsistent with the defendant's theory of the case. (*People v. Baker* (1999) 74 Cal.App.4th 243, 252; *People v. Barton* (1995) 12 Cal.4th 186, 195.)

If there is evidence that the defendant was the initial aggressor but tried to stop the fight, give Instruction 691, Right to Self-Defense: Mutual Combat or Initial Aggressor, instead of this instruction.

AUTHORITY

Instructional Requirements ▶ *People v. Olguin* (1995) 31 Cal.App.4th 1355, 1381; *Fragulia v. Sala* (1936) 17 Cal.App.2d 738, 743–744; *People v. Hinshaw* (1924) 194 Cal. 1, 26.

1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Defenses, § 75, p. 409.

STAFF NOTES

This instruction renders in plainer language the following: “[S]elf defense is not available as a plea to a defendant who has sought a quarrel with the design to force a deadly issue and thus, through his fraud, contrivance or fault, to create a real or apparent necessity for making a felonious assault.” (*People v. Hinshaw* (1924) 194 Cal. 1, 26.)

693. Right to Self-Defense: Escalation to Deadly Force

1 **If you decide that the defendant started the fight using nondeadly force and**
2 **the opponent responded with such sudden and deadly force that the**
3 **defendant could not withdraw, then the defendant was not required to try to**
4 **stop fighting and (he/she) had the right to defend (himself/herself) with**
5 **deadly force.**

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on defenses that are supported by the evidence and are not inconsistent with the defendant's theory of the case. (*People v. Baker* (1999) 74 Cal.App.4th 243, 252; *People v. Barton* (1995) 12 Cal.4th 186, 195.)

Give Instruction 691, Right to Self-Defense: Mutual Combat or Initial Aggressor, with this instruction. Also give Instruction 701, Justifiable Homicide: Self-Defense or Defense of Another, in conjunction with this instruction if the defendant is charged with homicide.

AUTHORITY

Instructional Requirements ▶ *People v. Sawyer* (1967) 256 Cal.App.2d 66, 75; *People v. Hecker* (1895) 109 Cal. 451, 464; *People v. Anderson* (1922) 57 Cal.App. 721, 727.

1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Defenses, § 75, pp. 409–410.

STAFF NOTES

This instruction is based on *Sawyer, Hecker, and Anderson*: “When the victim of a simple assault engages in a sudden and deadly counter assault, the original aggressor need not attempt to withdraw and may use reasonably necessary force in self-defense.” (*People v. Sawyer* (1968) 256 Cal.App.2d 66, 75; *People v. Hecker* (1895) 109 Cal. 451, 464 [emphasis in original].)

“A simple assault does not justify homicide.” (*People v. Anderson* (1922) 57 Cal.App.721, 727.)

694. Danger No Longer Exists or Attacker Disabled

- 1 **The right to use force in (self-defense/ [or] defense of another) continues only**
2 **as long as the danger appears to exist. It ends when the danger no longer**
3 **appears to exist. [When the attacker (withdraws/ [or] no longer appears**
4 **capable of inflicting any injury), then the right to use force ends.]**
-

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on self-defense when “it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant’s theory of the case.” (See *People v. Breverman* (1998) 19 Cal.4th 142, 157 [discussing duty to instruct on defenses generally]; see also *People v. Lemus* (1988) 203 Cal.App.3d 470, 478 [if substantial evidence of self-defense exists, court must instruct sua sponte and let jury decide credibility of witnesses].)

Related Instructions

Instruction 690, Right to Self-Defense or Defense of Another (Non-Homicide).
Instruction 701, Justifiable Homicide: Self-Defense or Defense of Another.
Instruction 691, Right to Self-Defense: Mutual Combat or Initial Aggressor.
Instruction 692, Right to Self-Defense: May Not Be Contrived.
Instruction 693, Right to Self-Defense: Escalation to Deadly Force.

AUTHORITY

Instructional Requirements ▶ See *People v. Keys* (1944) 62 Cal.App.2d 903, 916;
People v. Perez (1970) 12 Cal.App.3d 232, 236.

1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Defenses, § 76, pp.
410–411.

STAFF NOTES

People v. Keys (1944) 62 Cal.App.2d 903, 916:

The law of self-defense is based on the reasonable appearance of imminent peril of death of, or serious bodily injury to the party assailed. When that danger has passed and when the attacker has withdrawn from the combat, the defendant is not justified in pursuing him further and killing him, because the danger is not then imminent, and there is no apparent necessity to kill to prevent the death of or serious bodily injury to the defendant.

People v. Evans (1969) 2 Cal.App.3d 877, 882:

[A]ny right to self-defense ceased when defendant chased Mason with the knife. A defendant who is an aggressor has no right to stand his ground but must retreat [citation omitted]. Once danger is past, he cannot persist and use force [citation omitted]. Here, any danger was past as soon as defendant emerged from the [prison] laundry room.

People v. Perez (1970) 12 Cal.App.3d 232, 236:

[T]he right of self-defense is based upon the appearance of imminent peril to the person attacked. When that danger has passed and the attacker has withdrawn, there can be no justification for the use of further force.

People v. Martin (1980) 101 Cal.App.3d 1000, 1010:

CALJIC No. 5.52 reads: “The right of self-defense exists only as long as the real or apparent threatened danger continues to exist. When such danger ceases to appear to exist, the right to use force in self-defense ends.” This instruction was clearly warranted by the evidence that the victim was shot in the back.

People v. Smith (1981) 122 Cal.App.3d 581, 590:

“[T]he right of self-defense is based upon the appearance of imminent peril to the person attacked. When the danger has passed and the attacker has withdrawn, there can be no justification for the use of further force.”

People v. Gleghorn (1987) 193 Cal.App.3d 196, 202:

If a person attacked defends himself so successfully that his attacker is rendered incapable of inflicting injury, or for any other reason the danger no longer exists, there is no justification for further retaliation.

695. Right to Eject Trespasser From Real Property

1 **The (owner/lawful occupant) of a (home/property) may request that a**
2 **trespasser leave the (home/property). If the trespasser does not leave within a**
3 **reasonable time and it would appear to a reasonable person that the**
4 **trespasser poses a threat to the (home/property), the (owner/lawful occupant)**
5 **may use reasonable force to make the trespasser leave.**

6
7 ***Reasonable force* means the amount of force that a reasonably careful person**
8 **in the same situation would believe is necessary to make the trespasser leave.**

9
10 **[If the trespasser resists, the (owner/ lawful occupant) may increase the**
11 **amount of force he or she uses in proportion to the force used by the**
12 **trespasser and the threat the trespasser poses to the property.]**

13
14 **When deciding whether the defendant used reasonable force, consider all the**
15 **circumstances as they were known to and appeared to the defendant and**
16 **consider what a reasonable person in a similar situation with similar**
17 **knowledge would have believed. If the defendant's beliefs were reasonable,**
18 **the danger does not need to have actually existed.**

19
20 **The People have the burden of proving beyond a reasonable doubt that the**
21 **defendant used more force than was reasonable. If the People have not met**
22 **this burden, you must find the defendant not guilty of _____ <insert**
23 **crime>.**

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on a defense when the defendant is relying on the defense, or if there is substantial evidence supporting the defense and it is not inconsistent with the defendant's theory of the case. (See *People v. Breverman* (1998) 19 Cal.4th 142, 156 [addressing court's sua sponte instructional duties on defenses and lesser included offenses generally].)

Related Instructions

Instruction 696, Right to Defend Real or Personal Property.

Instruction 702, Justifiable Homicide: Defending Against Harm to Person Within Home.

Instruction 697, Presumption That Resident Was Reasonably Afraid of Death or Great Bodily Injury.

AUTHORITY

Instructional Requirements ▶ See *People v. Corlett* (1944) 67 Cal.App.2d 33, 51–52; *People v. Teixeira* (1899) 123 Cal. 297, 298–299; Civ. Code, § 50.

Burden of Proof ▶ See *Boyer v. Waples* (1962) 206 Cal.App.2d 725, 727 [civil action].

1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Defenses, § 78, p. 414.

RELATED ISSUES

Negating Self-Defense Claim

The right to defend one's home may negate a defendant's claim of imperfect self-defense, as held in *People v. Watie* (2002) 100 Cal.App.4th 866, 878:

[T]he right of a victim to defend himself and his property is a relevant consideration in determining whether a defendant may prevail when he seeks to negate malice aforethought by asserting the affirmative defense of imperfect self-defense. . . . If [the victim] had a right to use force to defend himself in his home, then defendant had no right of self-defense, imperfect, or otherwise.

STAFF NOTES

Ejecting Trespasser to Real Property

People v. Hubbard (1923) 64 Cal.App. 27, 35, states:

“One who is lawfully in charge of premises, and has requested another to leave whom he had a right so to request, may lawfully use as much force as is necessary to remove such other, after allowing him a reasonable time to depart.” (5 C. J., p. 745.) [. . .] The person who is acting in defense of his habitation must first use moderate means before resorting to extreme measures. But he may resist force with force, increasing it in the ratio of the intruder's resistance, without measuring it in golden scales; and whether he has used excessive force or not is a question for the jury.

People v. Corlett (1944) 67 Cal.App.2d 33, 51–52, holds that force is available when the trespasser is threatening injury to the property:

Most of the rejected instructions were erroneous in failing to state that the owner of property is justified in using force or a deadly weapon to eject a trespasser only *when it is manifest to one, as a reasonable person*, that injury to the property is contemplated, and that the owner is then entitled to use only such force as is *reasonably necessary* to justify the attack or to protect the property. (*People v. Teixeira*, 123 Cal. 297 [. . .]; Civ. Code, § 50; [. . .]\]

Civil Code section 50 authorizes the use of necessary force to defend person or property:

Any necessary force may be used to protect from wrongful injury the person or property of oneself, or of a wife, husband, child, parent, or other relative, or member of one's family, or of a ward, servant, master, or guest.

People v. Corlett, supra, 67 Cal.App.2d at p. 53, distinguishes between defense of home or outer buildings:

There is authority which may support the contention that the right to use *necessary* force in defense of the habitation or "castle" also extends to the curtilage which includes the outer buildings, such as bunkhouses. (40 C.J.S. 973, § 109b; 10 W. & P. (perm. ed.), 709.)

There is, however, a conflict of authorities as to whether the rule which authorizes necessary defense against threatened injury to the habitation also extends to the curtilage. Certainly the same necessity for defending the habitation and the members of the family therein does not exist to the same extent with respect to remote outbuildings in which no members of the family reside. Moreover, not even the "castle" is entirely exempt from the application of the law. The lord of the manor may not ruthlessly or brutally assault his guest or an employee because, forsooth, he does not like him. If he desires to eject one he may use only the force *necessary* to do so, and that only after fair warning to depart. He is certainly not entitled to use force and violence against one who is not likely to injure or destroy the property. It is apparent that the curtilage is not as sacred in the eyes of the law as is the "castle." But for the protection of neither the habitation nor the curtilage may the owner use more force than is reasonably necessary to prevent imminent damage to the property, even though that person is in fact a trespasser. The rejected instructions made no such distinction. They were therefore erroneous and misleading in that respect, and the court was justified in refusing to give them to the jury.

Negating Self-Defense Claim

The right to defend one's home may negate a defendant's claim of imperfect self-defense, as held in *People v. Watie* (2002) 100 Cal.App.4th 866, 878:

[T]he right of a victim to defend himself and his property is a relevant consideration in determining whether a defendant may prevail when he seeks to negate malice aforethought by asserting the affirmative defense of imperfect self-defense. [. . .] If [the victim] had a right to use force to defend himself in his home, then defendant had no right of self-defense, imperfect, or otherwise.

Trespasser

Case law generally describes the right to eject a "trespasser" without defining the term. The crime of trespass is defined in various code sections. For example, see Penal Code section 602(j) [entering lands for purpose of injuring property or property rights, or to interfere with business], 602(n) [refusing to leave property on request of a peace officer, owner, owner's agent, or person in lawful possession], and 602.5 [entering or remaining in dwelling house or residence without consent of owner, agent, or person in lawful possession].

696. Right to Defend Real or Personal Property

1 **The owner [or possessor] of (real/ [or] personal) property may use reasonable**
2 **force to protect that property from immediate harm.**

3
4 ***Reasonable force* means the amount of force that a reasonably careful person**
5 **in the same situation would believe is necessary to protect the property from**
6 **immediate harm.**

7
8 **When deciding whether the defendant used reasonable force, consider all the**
9 **circumstances as they were known to and appeared to the defendant and**
10 **consider what a reasonable person in a similar situation with similar**
11 **knowledge would have believed. If the defendant's beliefs were reasonable,**
12 **the danger does not need to have actually existed.**

13
14 **The People have the burden of proving beyond a reasonable doubt that the**
15 **defendant used more force than was reasonable to protect property from**
16 **immediate harm. If the People have not met this burden, you must find the**
17 **defendant not guilty of _____ <insert crime>.**

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on a defense when the defendant is relying on the defense, or if there is substantial evidence supporting the defense and it is not inconsistent with the defendant's theory of the case. (See *People v. Breverman* (1998) 19 Cal.4th 142, 156 [addressing court's sua sponte instructional duties on defenses and lesser included offenses generally].)

Related Instructions

Instruction 695, Right to Eject Trespasser From Real Property.

Instruction 702, Justifiable Homicide: Defending Against Harm to Person Within Home.

Instruction 697, Presumption That Resident Was Reasonably Afraid of Death or Great Bodily Injury.

AUTHORITY

Instructional Requirements ▶ See Civ. Code, § 50; *Boyer v. Waples* (1962) 206 Cal.App.2d 725, 727.

Burden of Proof ▶ See *Boyer v. Waples* (1962) 206 Cal.App.2d 725, 727 [civil action].

1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Defenses, § 78, p. 414.

STAFF NOTES

Defense of Real or Personal Property

Civil Code section 50 authorizes the use of necessary force to defend person or property:

Any necessary force may be used to protect from wrongful injury the person or property of oneself, or of a wife, husband, child, parent, or other relative, or member of one's family, or of a ward, servant, master, or guest.

Boyer v. Waples (1962) 206 Cal.App.2d 725, 727, quoted Civil Code section 50 before summarizing the amount of force available to defend property in a civil action:

The degree of force which may be used by a person in defense of himself, his family or his property must be limited to such force as would have appeared to be necessary to a reasonable man in all of the circumstances, knowing what the defendant knew, and facing the facts which presented themselves at the time to the defendant. [¶] The burden of proof of the affirmative defense of justification for the assault and that the force used was not excessive was upon the defendant.

Phelps v. Arnold (1931) 112 Cal.App. 518, 522, summarizes the rule in the context of a civil action for damages:

It is elemental that an owner of premises, such as being discussed, to wit, his home, is justified in using reasonable force to eject trespassers.

People v. Straiten (1977) 71 Cal.App.3d 526, 535:

CALJIC No. 5.43 is appropriately given where the threat is to ordinary, real or personal property. [Citation omitted.] There was no evidence that [the shooting victim] ever presented any threat to real or personal property. Accordingly, CALJIC NO. 5.43 was properly refused [. . .]

People v. Dunn (1974) 39 Cal.App.3d 418, 421:

The court instructed the jury that appellant's remedy against the strays was to drive them off or to confine them, and to sue their owner for damage to the land or crops and for the expense of keeping the animals if captured. This instruction was correct (. . . CALJIC No. 5.43). It further instructed that appellant could use reasonable force to drive off the animals but that use of force beyond that limit is regarded by the law as excessive and unjustified, and subjects the user of such force to the legal consequences thereof. [. . .] We find no error.

697. Presumption That Resident Was Reasonably Afraid of Death
or Great Bodily Injury

1 **The law presumes that the defendant reasonably feared immediate death or**
2 **great bodily injury to (himself/ herself)[, or to a member of (his/her) family or**
3 **household,] if:**

- 4
- 5 **1. An intruder unlawfully and forcibly (entered/ [or] was entering) the**
6 **defendant's home.**
- 7
- 8 **2. The defendant knew [or reasonably believed] that an intruder**
9 **unlawfully and forcibly (entered/ [or] was entering) the defendant's**
10 **home.**
- 11
- 12 **3. The intruder was not a member of the defendant's household or**
13 **family.**
- 14

15 **AND**

- 16
- 17 **4. The defendant used force intended to or likely to cause death or**
18 **great bodily injury to the intruder inside the home.**
- 19

20 ***Great bodily injury* means a significant or substantial physical injury.**

21

22 **The People have the burden of overcoming this presumption. This means that**
23 **the People must prove that the defendant did not have a reasonable fear of**
24 **immediate death or injury to (himself/herself)[, or to a member of his or her**
25 **family or household,] when (he/she) used force against the intruder. If the**
26 **People have not met this burden, you must find the defendant reasonably**
27 **feared death or injury to (himself/herself)[, or to a member of his or her**
28 **family or household].**

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on presumptions relevant to the issues of the case. (See *People v. Hood* (1969) 1 Cal.3d 444, 449; but see *People v. Silvey* (1997) 58 Cal.App.4th 1320, 1327 [presumption not relevant because

defendant was not a resident]; *People v. Owen* (1991) 226 Cal.App.3d 996, 1005 [jury was otherwise adequately instructed on pertinent law].)

AUTHORITY

Instructional Requirements ▶ Pen. Code, § 198.5; *People v. Brown* (1992) 6 Cal.App.4th 1489, 1494–1495.

Rebuttable Presumptions Affecting Burden of Proof ▶ Evid. Code, §§ 601, 604, 606.

1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Defenses, § 73, p. 407.

STAFF NOTES

Elements

Penal Code section 198.5 provides:

Any person using force intended or likely to cause death or great bodily injury within his or her residence shall be presumed to have held a reasonable fear of imminent peril of death or great bodily injury to self, family, or a member of the household when that force is used against another person, not a member of the family or household, who unlawfully and forcibly enters or has unlawfully and forcibly entered the residence and the person using the force knew or had reason to believe that an unlawful and forcible entry occurred.

As used in this section, great bodily injury means a significant or substantial physical injury.

The elements required for application of the section 198.5 presumption were summarized in *People v. Brown* (1992) 6 Cal.App.4th 1489, 1494–1495:

For section 198.5 to apply, four elements must be met. There must be an unlawful and forcible entry into a residence; the entry must be by someone who is not a member of the family or the household; the residential occupant must have used "deadly" force (as defined in § 198.5) against the victim within the residence; and finally, the residential occupant must have had knowledge of the unlawful and forcible entry.

The effect of the 1984 codification of section 198.5 is discussed in *People v. Hardin* (2000) 85 Cal.App.4th 625, 633:

With respect to defense of habitation, section 198.5 wrought a fundamental shift of emphasis. The use of deadly force by a homeowner is now presumed to be in response to a reasonable fear of imminent deadly danger. [Citations omitted.] The question of proportionality is thus tilted in favor of the homeowner. Insofar as *People v. Hecker, supra*, 109 Cal. 451 can be read as granting home invaders the right of imperfect self-defense to resist attempts at forcible eviction by a residential homeowner, such a construction is no longer tenable in light of section 198.5

Burden of Proof

Section 198.5 places the burden of proof on the People to prove the nonexistence of the presumed fact, as discussed in *People v. Owen* (1991) 226 Cal.App.3d 996, 1005:

Section 198.5 creates the rebuttable presumption that defendant had a reasonable fear of death or great bodily injury when he used deadly force against the victim. [Citations omitted.] Rebuttable presumptions affect either the burden of producing evidence or the burden of proof. [. . .] [T]he presumption in section 198.5 was implemented to promote a public policy and affects the burden of proof.

The effect of the presumption is to impose upon the People the burden of proof as to the nonexistence of the presumed fact. [Citation omitted.] The burden, therefore, was on the People to prove beyond a reasonable doubt that defendant did not have a reasonable fear of imminent peril of death or injury to himself or to [his girlfriend] when he killed the victim.

See Evidence Code section 606 [effect of presumptions affecting burden of proof].

Reasonable Expectation of Protection

The instruction should be denied when there is no reasonable expectation of protection from unauthorized intrusions, as held in *People v. Brown* (1992) 6 Cal.App.4th 1489, 1496, 1497, 1499:

We conclude the reasonable expectation test this court formulated in *Nible* [*People v. Nible* (1988) 200 Cal.App.3d 838] is the appropriate one to employ here. [. . .] [T]he proper question is whether *the nature of a structure's composition* is such that a reasonable person would expect some protection from unauthorized intrusions. [. . .] The safety-based reasonable expectation test is appropriate for the issue presented here involving [Penal Code] section 198.5. [. . .] Applying the reasonable expectation test to the ordinary, unenclosed front porch at issue here, we conclude that [the victim's] entry onto the porch cannot constitute entry into defendant's residence for purposes of section 198.5. [. . .] The trial court correctly denied defendant's request for a jury instruction based on section 198.5 [. . .]

A self-defense instruction, however, may be available to a resident with no reasonable expectation of protection, as discussed in *People v. Brown* (1992) 6 Cal.App.4th 1489, 1498:

If a residential occupant reasonably believes that bodily injury is about to be inflicted upon him or her by the intruder's presence on the porch, then the occupant can use reasonable force to repel the intruder, and the occupant, if tried, would be entitled to self-defense instructions.

Housemate or Guest

When one household member attacks another household member, the presumption does not apply in favor of the attacked housemate, but the right of self-defense still exists, as discussed in *People v. Gleghorn* (1987) 193 Cal.App.3d 196, 203–204:

Appellant is correct in that, if he was a member of the household, the presumption set forth in Penal Code section 198.5 would not apply. However, that does not mean that [the attacked housemate] did not have the right to defend himself against a violent attack in his own house, even if the attacker was another household member. (See Pen. Code, § 197, subd. 3.) There simply would be no *presumption* that he acted in reasonable fear of imminent peril, great bodily harm or death. Appellant cites no authority, nor do we know of any, that indicates the Legislature intended by its enactment of section 198.5 to *restrict* the long-standing right to defend oneself from attack in one's home, or abrogate the provisions of section 197.

See also *People v. Watie* (2002) 100 Cal.App.4th 866, 878 [victim's right to defend self and property relevant when defendant seeks to negate malice by asserting imperfect self-defense].

Section 198.5's presumption only applies to residents, not to guests, as stated in *People v. Silvey* (1997) 58 Cal.App.4th 1320, 1326–1327:

California law declares to be justifiable, homicide committed in reasonable defense of habitation (Pen. Code, § 197; [. . .]), but it extends the presumption of “a reasonable fear of imminent peril of death or great bodily injury” only to residents (Pen. Code, § 198.5). [. . .] [W]e can discern no indication the Legislature wanted to extend the protection of the presumption to guests.

No Entry

The presumption also does not apply, and the trial court has not duty to instruct on defense of habitation, when there is no entry, as held in *People v. Curtis* (1994) 30 Cal.App.4th 1337, 1361–1362:

Defendant [. . .] is not entitled to the benefit of this presumption because there was no actual entry. Because there was no evidence that a reasonable person in defendant's position would have believed [the victim] was about to break in, the trial court had no duty to instruct on defense of habitation.

720. Murder With Malice Aforethought

1 **The defendant is charged [in Count __] with (first degree/second degree)**
2 **murder.**

3
4 **To prove that the defendant is guilty of this crime, the People must prove**
5 **that:**

6
7 **1. The defendant committed an act that caused the death of another**
8 **person [or fetus].**

9
10 **[AND]**

11
12 **2. When the defendant acted, (he/she) had a state of mind called**
13 **malice aforethought.**

14
15 **[AND]**

16
17 **3. (He/She) killed without lawful excuse or justification.]**
18

19 **There are two kinds of malice aforethought, express malice and implied**
20 **malice. Proof of either is sufficient to establish the state of mind required for**
21 **murder.**

22
23 **The defendant acted with *express malice* if (he/she) intended to kill.**

24
25 **The defendant acted with *implied malice* if:**

26
27 **1. (He/She) intentionally committed an act.**

28
29 **2. The natural and probable consequences of the act were dangerous**
30 **to human life.**

31
32 **3. At the time (he/she) acted, (he/she) knew (his/her) act was**
33 **dangerous to human life.**

34
35 **AND**

36
37 **4. (He/She) deliberately acted with conscious disregard for human life.**
38

39 **Malice aforethought does not require hatred or ill will toward the victim.**

40
41 [A *fetus* is an unborn human being that has progressed beyond the embryonic
42 stage after major structures have been outlined, which occurs at seven to
43 eight weeks of development.]

44
45 A *natural and probable consequence* is one that a reasonable and prudent
46 person would know is likely to happen if nothing unusual intervenes. In
47 deciding whether a consequence is natural and probable, consider all of the
48 circumstances established by the evidence.

49
50 [An act causes death if the death is the direct, natural, and probable
51 consequence of the act.]

52
53 [There may be more than one cause of death. An act causes death only if it is
54 a substantial factor in causing the death. A *substantial factor* is more than a
55 trivial or remote factor. However, it need not be the only factor that causes
56 the death.]

57
58 [A _____ <insert description of person owing duty> has a legal duty to
59 (help/care for/rescue/warn/maintain the property of/ _____ <insert other
60 required action[s]>) _____ <insert description of decedent/person to whom
61 duty is owed>.

62
63 If you conclude that the defendant owed a duty to _____ <insert name or
64 description of decedent>, and the defendant failed to perform that duty,
65 (his/her) failure to act is the same as doing a negligent or injurious act.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on the first two elements of the crime. If there is sufficient evidence of excuse or justification, the court has a **sua sponte** duty to include the third, bracketed element in the instruction. (*People v. Frye* (1992) 7 Cal.App.4th 1148, 1155–1156.)

If causation is at issue, the court has a **sua sponte** duty to instruct on proximate cause. (*People v. Bernhardt* (1963) 222 Cal.App.2d 567, 590–591.) If the evidence indicates that there was only one cause of death, the court should give the “direct, natural, and probable” language in the first bracketed paragraph on causation. If there is evidence of multiple causes of death, the court should give the “substantial factor” instruction and definition in the second bracketed causation paragraph.

(See *People v. Autry* (1995) 37 Cal.App.4th 351, 363; *People v. Pike* (1988) 197 Cal.App.3d 732, 746–747.)

If the court makes a legal finding that the defendant owed a duty to the victim, case law supports giving the last bracketed pair of paragraphs on request. (*People v. Burden* (1977) 72 Cal.App.3d 603, 615–616; see Instruction 757, Involuntary Manslaughter: Failure to Perform Legal Duty—Murder Not Charged.)

Related Instructions

If the defendant is charged with first degree murder, give this instruction and Instruction 721, Murder: Degrees. If the defendant is charged with second degree murder, no other instruction need be given.

If the defendant is also charged with first or second degree felony murder, instruct on those crimes and give Instruction 737, Malice Versus Felony Murder.

If there is an issue regarding a superseding or intervening cause, give the appropriate portion of Instruction 780, Causation: Special Issues.

AUTHORITY

Elements ▶ Pen. Code, § 187.

Malice ▶ Pen. Code, § 188; *People v. Dellinger* (1989) 49 Cal.3d 1212, 1217–1222; *People v. Nieto Benitez* (1992) 4 Cal.4th 91, 103–105.

Causation ▶ *People v. Roberts* (1992) 2 Cal.4th 271, 315–321.

Fetus Defined ▶ *People v. Davis* (1994) 7 Cal.4th 797, 814–815.

Ill Will Not Required for Malice ▶ *People v. Seden* (1974) 10 Cal.3d 703, 722 [overruled on other grounds in *People v. Flannel* (1979) 25 Cal.3d 668, 684, fn. 12].

1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against the Person, §§ 91–97.

LESSER INCLUDED OFFENSES

Voluntary Manslaughter ▶ Pen. Code, § 192(a).

Involuntary Manslaughter ▶ Pen. Code, § 192(b).

Vehicular Manslaughter ▶ Pen. Code, § 192(c).

Attempted Murder ▶ Pen. Code, §§ 663, 189.

Gross vehicular manslaughter while intoxicated (Pen. Code, § 191.5(a)) is not a lesser included offense of murder. (*People v. Sanchez* (2001) 24 Cal.4th 983, 988–

992.) Similarly, child abuse homicide (Pen. Code, § 273ab) is not a necessarily included offense of murder. (*People v. Malfavon* (2002) 102 Cal.App.4th 727, 744.)

RELATED ISSUES

Causation—Foreseeability

Authority is divided on whether a causation instruction should include the concept of foreseeability. (See *People v. Autry* (1995) 37 Cal.App.4th 351, 362–363; *People v. Temple* (1993) 19 Cal.App.4th 1750, 1756 [refusing defense-requested instruction on foreseeability in favor of standard causation instruction]; but see *People v. Gardner* (1995) 37 Cal.App.4th 473, 483 [suggesting the following language be used in a causation instruction: “[t]he death of another person must be foreseeable in order to be the natural and probable consequence of the defendant’s act”].) It is clear, however, that it is error to instruct a jury that foreseeability is immaterial to causation. (*People v. Roberts* (1992) 2 Cal.4th 271, 315 [error to instruct a jury that when deciding causation it “[w]as immaterial that the defendant could not reasonably have foreseen the harmful result”].)

Second Degree Fetal Murder

“When the charge is second degree murder of a fetus, malice aforethought must be proved separately as to the fetus. . . . The evidence supports the physical component [of the implied malice theory], but not the mental component. There is not an iota of evidence that appellant knew his conduct endangered fetal life and acted with disregard of that fetal life.” (*People v. Taylor* (2002) 103 Cal.App.4th 1275 [REVIEW GRANTED AND DEPUBLISHED, Feb. 19, 2003, S112443.]

721. Murder: Degrees

1 **If you decide that the defendant has committed murder, you must determine**
2 **whether it is murder of the first or second degree.**

3
4 *<Select the appropriate section[s]. Give the final two paragraphs in every case.>*

5
6 *<A. Deliberation and Premeditation>*

7 **[The defendant is guilty of first degree murder if the People have proved that**
8 **the defendant acted willfully, deliberately, and with premeditation. The**
9 **defendant acted willfully if (he/she) intended to kill. The defendant**
10 **deliberated and premeditated if, before acting, (he/she) carefully weighed the**
11 **considerations for and against (his/her) choice and, knowing the**
12 **consequences, decided to kill.**

13
14 **The length of time the person spends considering whether to kill does not**
15 **alone determine whether the killing is deliberate and premeditated. The**
16 **amount of time required for deliberation and premeditation may vary from**
17 **person to person and according to the circumstances. A decision to kill made**
18 **rashly, impulsively, or without careful consideration of the choice and its**
19 **consequences is not deliberate and premeditated. On the other hand, a cold,**
20 **calculated decision to kill can be reached quickly. The test is the extent of the**
21 **reflection, not the length of time.]**

22
23 *<B. Torture>*

24 **[The defendant is guilty of first degree murder if the People have proved that**
25 **the defendant murdered by torture. The defendant murdered by torture if:**

- 26
27 **1. (He/She) willfully, deliberately, and with premeditation intended to**
28 **inflict extreme and prolonged pain on the person killed.**
29
30 **2. (He/She) intended to inflict such pain on the person killed for the**
31 **calculated purpose of revenge, extortion, persuasion, or any other**
32 **sadistic reason.**

33
34 **AND**

- 35
36 **3. The torture was a cause of death.**

37
38 **[A person commits an act *willfully* when he or she does it willingly or on**
39 **purpose. A person acts with *deliberation* or *premeditation* if, before acting, the**

person carefully weighs the considerations for and against his or her choice and, knowing the consequences, decides to act.]

[There is no requirement that the person killed be aware of the pain.]]

<C. Lying in Wait>

[The defendant is guilty of first degree murder if the People have proved that the defendant murdered while lying in wait or immediately thereafter. The defendant murdered by lying in wait if:

1. (He/She) concealed (his/her) purpose from the person killed.

2. (He/She) waited and watched for an opportunity to act.

AND

3. Then, from a position of advantage, (he/she) intended to and did make a surprise attack on the person killed.

The lying in wait does not need to continue for any particular period of time, but its duration must show a state of mind equivalent to deliberation or premeditation. [A person acts with *deliberation* or *premeditation* if, before acting, the person carefully weighs the considerations for and against his or her choice and, knowing the consequences, decides to act.]

[A person may conceal his or her purpose even though the person killed is aware of the person's physical presence.] [The concealment may be accomplished by ambush or some other secret plan.]]

<D. Destructive Device or Explosive>

[The defendant is guilty of first degree murder if the People have proved that the defendant murdered by using a destructive device or explosive.

[An *explosive* is any substance, or combination of substances, (1) whose main or common purpose is to detonate or rapidly combust and (2) which is capable of a relatively instantaneous or rapid release of gas and heat.]

[An *explosive* is also any substance whose main purpose is to be combined with other substances to create a new substance that can release gas and heat rapidly or relatively instantaneously.]

[A _____ *<insert type of destructive device from Pen. Code, § 12301>* is a destructive device.]

[A _____ <insert type of explosive from Health & Saf. Code, § 12000> is an explosive.]]

<E. Weapon of Mass Destruction>

[The defendant is guilty of first degree murder if the People have proved that the defendant murdered by using a weapon of mass destruction.

[A *weapon of mass destruction* includes (chemical warfare agents[,]/ weaponized biological or biologic warfare agents[,]/ restricted biological agents[,]/ nuclear agents[,]/ radiological agents[,]/ the intentional release of industrial agents as a weapon[,]/ [or] a[n] (aircraft/vessel/vehicle as defined in Vehicle Code section 34500) that is used as a destructive weapon).]

[A _____ <insert type of weapon from Pen. Code, § 11417(a)(1)> is a weapon of mass destruction.]

[A _____ <insert type of agent from Pen. Code, § 11417(a)(2)> is a chemical warfare agent.]]

<F. Penetrating Ammunition>

[The defendant is guilty of first degree murder if the People have proved that when the defendant murdered, (he/she) knowingly used ammunition designed primarily to penetrate metal or armor to commit the murder.]

<G. Discharge From Vehicle>

[The defendant is guilty of first degree murder if the People have proved that the defendant murdered by shooting a firearm from a motor vehicle. The defendant committed this kind of murder if:

1. (He/She) shot a firearm from a motor vehicle.
 2. (He/She) intentionally shot at a person who was outside the vehicle.
- AND
3. (He/She) intended to kill that person.

A *firearm* is any device designed to be used as a weapon, from which a projectile is expelled through a barrel by the force of an explosion or other form of combustion.

125 **A motor vehicle includes a (passenger vehicle/motorcycle/motor**
126 **scooter/bus/school bus/commercial vehicle/truck tractor and**
127 **trailer/ _____ <insert other type of motor vehicle>).]**
128
129 **<H. Poison>**
130 **[The defendant is guilty of first degree murder if the People have proved that**
131 **the defendant murdered by using poison.**
132
133 **[Poison is a substance, applied externally or introduced into the body, that**
134 **kills by its own inherent qualities.]]**
135
136 **<GIVE FINAL TWO PARAGRAPHS IN EVERY CASE.>**
137 **All other murders are of the second degree.**
138
139 **The People have the burden of proving beyond a reasonable doubt that the**
140 **killings were first degree rather than a lesser crime. If the People have not met**
141 **this burden, you must find the defendant not guilty of first degree murder.**

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime. Before giving this instruction, the court must give Instruction 720, Murder With Malice Aforethought. Depending upon the theory of first degree murder relied upon by the prosecutor, instruct using the appropriate alternatives A through H.

The court **must give** the final two paragraphs in every case.

When instructing on torture or lying in wait, give the bracketed sections explaining the meaning of deliberate and premeditated if those terms have not already been defined for the jury.

When instructing on murder by weapon of mass destruction, explosive, or destructive device, if the device used is listed in the code section noted in the instruction, the court may use the bracketed sentence stating, "A _____ is a weapon of mass destruction" or "is a chemical warfare agent," etc. For example, "Sarin is a chemical warfare agent." However, the court may not instruct the jury that the defendant used the prohibited weapon. For example, the court may not state, "the defendant used a chemical warfare agent, sarin," or "the material used by the defendant, sarin, was a chemical warfare agent." (*People v. Dimitrov* (1995) 33 Cal.App.4th 18, 25–26.)

AUTHORITY

Types of Statutory First Degree Murder ▶ Pen. Code, § 189.
Armor Piercing Ammunition Defined ▶ Pen. Code, § 12323(b).
Destructive Device Defined ▶ Pen. Code, § 12301.
Explosive Defined ▶ Health & Saf. Code, § 12000; *People v. Clark* (1990) 50 Cal.3d 583, 604.
Weapon of Mass Destruction Defined ▶ Pen. Code, § 11417.
Discharge From Vehicle ▶ *People v. Chavez* (2002) 101 Cal.App.4th 88, [drive-by shooting clause is not an enumerated felony for purposes of the felony murder rule] REVIEW GRANTED AND DEPUBLISHED, S109918.
Lying in Wait Requirements ▶ *People v. Stanley* (1995) 10 Cal.4th 764, 794; *People v. Ceja* (1993) 4 Cal.4th 1134, 1139; *People v. Webster* (1991) 54 Cal.3d 411, 448; *People v. Laws* (1993) 12 Cal.App.4th 786, 794–795.
Poison Defined ▶ *People v. Van Deleer* (1878) 53 Cal. 147, 149.
Premeditation and Deliberation Defined ▶ *People v. Anderson* (1968) 70 Cal.2d 15, 26–27; *People v. Bender* (1945) 27 Cal.2d 164, 183–184; *People v. Daugherty* (1953) 40 Cal.2d 876, 901–902.
Torture Requirements ▶ *People v. Pensinger* (1991) 52 Cal.3d 1210, 1239; *People v. Bittaker* (1989) 48 Cal.3d 1046, 1101, habeas corpus granted in part on other grounds in *In re Bittaker* (1997) 55 Cal.App.4th 1004; *People v. Wiley* (1976) 18 Cal.3d 162, 168–172.

1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against the Person, §§ 102–162.

LESSER INCLUDED OFFENSES

Murder ▶ Pen. Code, § 187.
Voluntary Manslaughter ▶ Pen. Code, § 192(a).
Involuntary Manslaughter ▶ Pen. Code, § 192(b).
Vehicular Manslaughter ▶ Pen. Code, § 192(c).
Gross Vehicular Manslaughter While Intoxicated ▶ Pen. Code, § 191.5.
Attempted First Degree Murder ▶ Pen. Code, §§ 663, 189.
Attempted Murder ▶ Pen. Code, §§ 663, 187.

RELATED ISSUES

Premeditation and Deliberation—Anderson Factors
Evidence in any combination from the following categories suggests premeditation and deliberation: (1) events before the murder that indicate

planning; (2) motive, specifically evidence of a relationship between the victim and the defendant; and (3) method of the killing that is particular and exacting and evinces a preconceived design to kill. (*People v. Anderson* (1968) 70 Cal.2d 15, 26–27.) Although these categories have been relied on to decide whether premeditation and deliberation are present, an instruction that suggests that each of these factors *must* be found in order to find deliberation and premeditation is not proper. (*People v. Lucero* (1988) 44 Cal.3d 1006, 1020–1021.) *Anderson* also noted that the brutality of the killing alone is not sufficient to support a finding that the killer acted with premeditation and deliberation. For example, the infliction of multiple acts of violence on the victim without any other evidence indicating premeditation will not support a first degree murder conviction. (*People v. Anderson, supra*, 70 Cal.2d at pp. 24–25.)

Premeditation and Deliberation—Heat of Passion Provocation

Provocation may reduce murder from first to second degree. (*People v. Thomas* (1945) 25 Cal.2d 880, 903 [provocation raised reasonable doubt about premeditation or deliberation, “leaving the homicide as murder of the second degree; i.e., an unlawful killing perpetrated with malice aforethought but without premeditation and deliberation”]; see *People v. Padilla* (2002) 103 Cal.App.4th 675, 679 [evidence of hallucination is admissible at guilt phase to negate deliberation and premeditation and to reduce first degree murder to second degree murder].) There is, however, no sua sponte duty to instruct the jury on this issue. (*People v. Middleton* (1997) 52 Cal.App.4th 19, 31–33.)

Torture—Causation

The finding of murder by torture encompasses the totality of the brutal acts and circumstances that led to a victim’s death. “The acts of torture may not be segregated into their constituent elements in order to determine whether any single act by itself caused the death; rather, it is the continuum of sadistic violence that constitutes the torture [citation].” (*People v. Proctor* (1993) 4 Cal.4th 499, 530–531.)

Torture—Instruction on Voluntary Intoxication

“[A] court should instruct a jury in a torture-murder case, when evidence of intoxication warrants it, that intoxication is relevant to the specific intent to inflict cruel suffering.” (*People v. Pensinger* (1991) 52 Cal.3d 1210, 1242; see Instruction 709, Voluntary Intoxication: Effects on Homicide Crimes.)

Torture—Pain Not an Element

All that is required for first degree murder by torture is the calculated *intent to cause pain* for the purpose of revenge, extortion, persuasion, or any other sadistic purpose. There is no requirement that the victim actually suffer pain. (*People v. Pensinger* (1991) 52 Cal.3d 1210, 1239.)

Torture—Premeditated Intent to Inflict Pain

Although the Court of Appeal did not address an instructional duty on this point, in its analysis of the sufficiency of the evidence of intent to inflict extreme pain, the court applied the guidelines established in *People v. Anderson* (1968) 70 Cal.2d 15, 26–27, to determine premeditation and deliberation. (*People v. Mincey* (1992) 2 Cal.4th 408, 434–436.)

Lying in Wait—Length of Time Equivalent to Premeditation and Deliberation

In *People v. Stanley* (1995) 10 Cal.4th 764, 794, the court approved this instruction regarding the length of time a person lies in wait: “[T]he lying in wait need not continue for any particular time, provided that its duration is such as to show a state of mind equivalent to premeditation or deliberation.”

Discharge From a Vehicle—Vehicle Does Not Have to Be Moving

Penal Code section 189 does not require the vehicle to be moving when the shots are fired. (Pen. Code, § 189; see also *People v. Bostick* (1996) 46 Cal.App.4th 287, 291 [finding vehicle movement is not required in context of enhancement for discharging firearm from motor vehicle under Pen. Code, § 12022.55].)

722. First Degree Murder: Hate Crime

1 **If you find the defendant guilty of first degree murder [under Count ____],**
2 **you must then determine whether the People have proved the additional**
3 **allegation that the murder was committed because of the decedent's**
4 **(disability[,]/ gender[,]/ [or] sexual orientation).**

5
6 **To prove this additional allegation the People must prove that:**

7
8 **1. The defendant intentionally killed _____** *<insert name or*
9 *description of decedent>.*

10
11 **AND**

12
13 **2. The defendant was motivated to kill _____** *<insert name or*
14 *description of decedent> because (he/she) was biased against*
15 *_____’s <insert name or description of decedent> (disability[,]/*
16 *gender[,]/ [or] sexual orientation) [or because of the defendant’s*
17 *belief about _____’s <insert name or description of decedent>*
18 *(disability[,]/ gender[,]/ [or] sexual orientation)].*

19
20 **The defendant’s bias must have caused (him/her) to commit the murder. If**
21 **the defendant had more than one reason to commit the murder, (his/her) bias**
22 **must have been a substantial factor motivating (his/her) conduct. A**
23 ***substantial factor* is more than a trivial or remote factor; it need not have been**
24 **the only factor motivating the defendant.**

25
26 **[Gender means the victim’s actual sex or the defendant’s perception of the**
27 **victim’s sex, and includes the defendant’s perception of the victim’s identity,**
28 **appearance, or behavior, whether or not these factors are different from**
29 **those traditionally associated with the victim’s sex at birth.]**

30
31 **The People have the burden of proving beyond a reasonable doubt that the**
32 **defendant was motivated to kill by this bias. If the People have not met this**
33 **burden, you must find this additional allegation has not been proved.**

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of

the sentencing enhancement. (See *People v. Marshall* (2000) 83 Cal.App.4th 186, 193–195 [applying *Apprendi* to firearm use enhancement]; *Apprendi v. New Jersey* (2000) 530 U.S. 466, 475–476, 490 [any fact, other than prior conviction, that increases the maximum penalty for a crime must be charged, submitted to a jury, and proved beyond a reasonable doubt].)

AUTHORITY

Murder Because of Disability, Gender, or Sexual Orientation ► Pen. Code, § 190.03(a).

“Because of” Defined ► Pen. Code, § 190.03(c); *People v. Superior Court (Aishman)* (1995) 10 Cal.4th 735, 741; *In re M.S.* (1995) 10 Cal.4th 698, 719–720.

Gender Defined ► Pen. Code, § 422.76.

3 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Punishment, § 459.

STAFF NOTES

Statutory Authority

Pen. Code, § 190.03(a) states:

(a) A person who commits first-degree murder shall be punished by imprisonment in the state prison for life without the possibility of parole, if the defendant intentionally killed the victim because of the victim's disability, gender, or sexual orientation or because of the defendant's perception of the victim's disability, gender, or sexual orientation.

(b) The term authorized by subdivision (a) shall not apply unless the allegation is charged in the accusatory pleading and admitted by the defendant or found true by the trier of fact. The court shall not strike the allegation, except in the interest of justice, in which case the court shall state its reasons in writing for striking the allegation.

(c) For the purpose of this section, "because of" means the bias motivation must be a cause in fact of the offense, whether or not other causes also exist. When multiple concurrent motives exist, the prohibited bias must be a substantial factor in bringing about the particular result. This subdivision does not constitute a change in, but is declaratory of, existing law as set forth in *In re M.S.* (1995) 10 Cal.4th 698, 716-20 and *People v. Superior Court of San Diego County (Aishman)* (1995) 10 Cal.4th 735.

(d) Nothing in this section shall be construed to prevent punishment instead pursuant to any other provision of law that imposes a greater or more severe punishment.

Related Instruction and Statute: Felony Murder Hate Crime

This instruction is modeled on Instruction 1031: Felony Motivated by Bias, applicable to enhancements under Penal Code section 422.75. Penal Code section 422.75 provides for increased penalties if the felony is motivated by bias. The statute uses the same language as Penal Code section 190.03, at issue here.

“Because Of”

Penal Code section 190.03(c) defines “because of, consistent with prior hate crimes statutes and case law. (See Pen. Code, §§ 422.6, 422.7, 422.75; *In Re M.S.* (1995) 10 Cal.4th 698, 719–720; *People v. Superior Court of San Diego County (Aishman)* (1995) 10 Cal.4th 735, 741.) The Supreme Court in *In Re M.S.* (1995) 10 Cal.4th 698, 719–720 explained:

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By employing the phrase “because of” in section 422.6 and 422.7, the Legislature has simply dictated the bias motivation must be a cause in fact of the offense, whether or not other causes also exist. [Citations.] When multiple concurrent motives exist, the prohibited bias must be a substantial factor in bringing about the crime.

Justice Kennard defined “cause in fact” in her concurring opinion (*Id.* at pp. 731–732):

When a person has acted to deprive another of civil rights, and the evidence reveals both bias and nonbias motives, the bias motives will be a “cause in fact” of the conduct if either (1) the conduct would not have occurred in the absence of the bias motives, or (2) the bias and nonbias motives are independent of each other and the bias motives would have been sufficient to produce the conduct even in the absence of all nonbias motives.

“Gender” Defined

“Gender” is defined in Penal Code section 422.76 as follows:

For purposes of [. . .] Section 422.7, [. . . and] Section 422.75, [. . .], “gender” means the victim’s actual sex or the defendant’s perception of the victim’s sex, and includes the defendant’s perception of the victim’s identity, appearance, or behavior, whether or not that identity, appearance, or behavior is different from that traditionally associated with the victim’s sex at birth.

The statute does not specifically include Penal Code section 190.03, at issue here. However, because Penal Code section 190.03 is modeled on the statutes reference in Penal Code section 422.67, the definition would seem appropriate.

***Dewberry* Instruction**

“[W]hen the evidence is sufficient to support a finding of guilt of both the offense charged and a lesser included offense, the jury must be instructed that if they entertain a reasonable doubt as to which offense has been committed, they must find the defendant guilty only of the lesser offense.” (*People v. Dewberry* (1959) 51 Cal.2d 548, 555.) A *Dewberry* instruction is required whether the lesser-included offense is charged or uncharged. (*People v. Crone* (1997) 54 Cal.App.4th 71, 78.) For any case involving a lesser included offense, the trial court has a duty to give a *Dewberry* instruction sua sponte. (*Id.* at p. 76.) It is undecided whether the trial court has a sua sponte duty to give a *Dewberry* Instruction in the context of sentencing enhancements.

723. Second Degree Murder: Peace Officer

1 **If you find the defendant guilty of second degree murder [under Count ____],**
2 **you must then determine whether the People have proved the additional**
3 **allegation that (he/she) murdered a peace officer.**

4
5 **To prove this additional allegation the People must prove that:**

- 6
7 **1. _____ <insert officer's name, excluding title>, was a peace**
8 **officer lawfully performing the duties of (a/an) _____ <insert**
9 **title of peace officer specified in Pen. Code, § 830.1 et seq.>.**

10
11 **[AND]**

- 12
13 **2. When the defendant murdered _____ <insert officer's name,**
14 **excluding title>, the defendant knew, or reasonably should have**
15 **known, that _____ <insert officer's name, excluding title> was a**
16 **peace officer who was performing (his/her) duties.**

17
18 **[AND]**

- 19
20 **3. The defendant (intended to kill the peace officer/ [or] intended to**
21 **inflict great bodily injury on the peace officer/ [or] personally used**
22 **a (deadly weapon/ [or] firearm) to kill the peace officer.]**

23
24 **[Great bodily injury means significant or substantial physical injury.]**

25
26 **[A deadly weapon is any object, instrument, or weapon that is used in a way**
27 **capable of causing and likely to cause death or great bodily injury.]**

28
29 **[A firearm is any device designed to be used as a weapon, from which a**
30 **projectile is expelled through a barrel by the force of an explosion or other**
31 **form of combustion.] [A firearm need not be in working order if it was**
32 **designed to shoot and appears capable of shooting.]**

33
34 **[The phrase personally used a (deadly weapon/ [or] firearm) means that a**
35 **person intentionally displayed a (deadly weapon/ [or] firearm) in a menacing**
36 **manner [, intentionally fired a firearm,] or intentionally hit another person**
37 **with a (deadly weapon/ [or] firearm).]**

39 **[The People allege that the defendant _____ <insert all of the factors**
40 **from element 3 when multiple factors are alleged>. You may not find the**
41 **defendant guilty unless all of you agree that the People have proved at least**
42 **one of these alleged facts and you all agree that the same fact or facts were**
43 **proved. You need not specify the fact or facts in your verdict.]**
44

45 **[A sworn member of _____ <insert name of agency that employs peace**
46 **officer>, authorized by _____ <insert appropriate section from Pen. Code,**
47 **§ 830 et seq.> to _____ <describe statutory authority>, is a peace officer.]**
48

49 **The duties of a _____ <insert title of peace officer specified in Pen. Code, §**
50 **830.1 et seq.> include _____ <insert job duties>.**
51

52 **[A peace officer is not lawfully performing his or her duties if he or she is**
53 **(unlawfully arresting or detaining someone/ [or] using unreasonable or**
54 **excessive force when (making/attempting to make) an otherwise lawful arrest**
55 **or detention).]** *<Give one or more of the following paragraphs defining*
56 *lawfulness of officer's conduct if the instructions are not already given to the jury*
57 *in the instructions for a greater offense. If the instructions have already been*
58 *given, use the first bracketed paragraph below. Give the final paragraph in every*
59 *case.>*
60

61 *<Instruction Already Given>*

62 **[Instruction _____ <insert instruction number> explains when an officer is**
63 **(unlawfully arresting or detaining someone/ [or] using unreasonable or**
64 **excessive force when (making/attempting to make) an otherwise lawful arrest**
65 **or detention).]**
66

67 *<A. Unlawful Detention>*

68 **[A peace officer may legally detain someone if:**
69

- 70 **1. He or she knows specific facts that lead him or her to suspect that**
71 **the person to be detained has been, is, or is about to be involved in**
72 **activity relating to crime.**
73

74 **AND**
75

- 76 **2. A reasonable officer who knew the same facts would have the same**
77 **suspicion.**
78

79 **Any other detention is unlawful.**
80

81 In deciding whether the detention was unlawful, consider evidence of the
82 officer's training and experience and all the circumstances known by the
83 officer when he or she detained the person.]

84
85 <B. Unlawful Arrest>

86 [A peace officer may legally arrest someone [either] (on the basis of an arrest
87 warrant/ [or] if he or she has probable cause to make the arrest).

88
89 Any other arrest is unlawful.

90
91 An officer has *probable cause* to arrest when he or she knows facts that would
92 lead a person of ordinary care and prudence to honestly and strongly suspect
93 that the person to be arrested is guilty of a crime.

94
95 [In order for an officer to lawfully arrest someone without a warrant for a
96 misdemeanor or infraction, the officer must have probable cause to believe
97 that the person to be arrested committed a misdemeanor or infraction in the
98 officer's presence.]

99
100 [[On the other hand,] (In/in) order for an officer to lawfully arrest someone
101 for a (felony/ [or] _____ <insert misdemeanor not requiring commission in
102 officer's presence; see Bench Notes>) without a warrant, that officer must have
103 probable cause to believe the person to be arrested committed a (felony/ [or]
104 _____ <insert misdemeanor not requiring commission in officer's presence;
105 see Bench Notes>). However, it is not required that the offense be committed
106 in the officer's presence.]

107
108 _____ <insert crime that was basis for arrest> is (a/an)
109 (felony/misdemeanor/infraction).

110
111 [In order for an officer to enter a home without a warrant to arrest someone:

- 112
113 1. The officer must have probable cause to believe that the person to
114 be arrested committed a crime.

115
116 AND

- 117
118 2. Exigent circumstances require the officer to enter the home without
119 a warrant.

120
121 The term *exigent circumstances* describes an emergency situation that
122 requires swift action to prevent (1) imminent danger to life or serious damage

to property, or (2) the imminent escape of a suspect or destruction of evidence.]

[The officer must tell that person that the officer intends to arrest him or her, why the arrest is being made, and the authority for the arrest.][The officer does not have to tell the arrested person these things if the officer has probable cause to believe that the person is committing or attempting to commit a crime, is fleeing after having committed a crime, or has escaped from custody.][The officer must also tell the arrested person the offense for which (he/she) is being arrested if (he/she) asks for that information.]]

<C. Use of Force>

[Special rules control the use of force.

A peace officer may use reasonable force to arrest or detain someone, to prevent escape, to overcome resistance, or in self-defense.

If a person knows, or reasonably should know, that a peace officer is arresting or detaining him or her, the person must not use force or any weapon to resist an officer's use of reasonable force.

If a peace officer uses unreasonable or excessive force while (arresting/attempting to arrest/detaining/attempting to detain) a person, that person may lawfully use reasonable force to defend (himself/herself).

A person being arrested uses *reasonable force* when he or she uses that degree of force that he or she actually believes is reasonably necessary to protect himself or herself from the officer's use of unreasonable or excessive force. The force must be no more than a reasonable person in the same situation would believe is necessary for his or her protection.

[If you find the defendant used reasonable force in response to the officer's use of excessive force, you must find the defendant not guilty of this additional allegation.]]

<GIVE IN EVERY CASE.>

The People have the burden of proving beyond a reasonable doubt that the defendant committed second degree murder on a peace officer. If the People have not met this burden, you must find this additional allegation has not been proved.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the sentencing enhancement. (See *People v. Marshall* (2000) 83 Cal.App.4th 186, 193–195 [applying *Apprendi* to firearm use enhancement]; *Apprendi v. New Jersey* (2000) 530 U.S. 466, 475–476, 490 [any fact, other than prior conviction, that increases the maximum penalty for a crime must be charged, submitted to a jury, and proved beyond a reasonable doubt].)

If the defendant is charged under Penal Code section 190(b), give only elements 1 and 2. If the defendant is charged under Penal Code section 190(c), give all three elements, specifying the appropriate factors in element 3, and give the appropriate definitions, which follow in brackets. Give the bracketed unanimity instruction if the People allege more than one factor in element 3.

In order to be “engaged in the performance of his or her duties,” a peace officer must be acting lawfully. (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1217.) “[D]isputed facts bearing on the issue of legal cause must be submitted to the jury considering an engaged-in-duty element.” (*Ibid.*) On request, the court must instruct that the People have the burden of proving the lawfulness of the arrest beyond a reasonable doubt. (*People v. Castain* (1981) 122 Cal.App.3d 138, 145.) If excessive force is an issue, the court has a **sua sponte** duty to instruct the jury that the defendant is not guilty of the offense charged, or any lesser included offense in which lawful performance is an element, if the defendant used reasonable force in response to excessive force. (*People v. Olguin* (1981) 119 Cal.App.3d 39, 46–47.)

Give the appropriate bracketed paragraphs on the lawfulness of the officer’s conduct if those instructions have not already been given in the instructions for a greater offense. If the instructions have been given, use the bracketed paragraph directing the jury to that other instruction.

In the paragraphs headed “A. Unlawful Detention,” if the case presents a factual issue of whether the defendant was in fact detained, the court should provide the jury with a definition of when a person is legally detained.

In the paragraphs headed “B. Unlawful Arrest,” several options are given depending on the crime for which the arrest was made. The general rule is that an officer may not make an arrest for a misdemeanor or infraction unless the offense was committed in the officer’s presence. (See Pen. Code, § 836(a)(1).) Statutes provide exceptions to this requirement for some misdemeanors. (See, e.g., Pen.

Code, § 836(c) [violation of domestic violence protective or restraining order]; Veh. Code, § 40300.5 [driving under the influence plus traffic accident or other specified circumstance].) If the defense does not rely on the statutory limitation, neither bracketed paragraph regarding arrest without a warrant need be given. If the only offense on which the officer relied in making the arrest is a nonexempted misdemeanor or an infraction, give the first bracketed paragraph beginning “In order for an officer to lawfully arrest someone without a warrant.” If the officer allegedly made the arrest for both a misdemeanor or infraction *and* a felony or exempted misdemeanor, give both bracketed paragraphs.

In cases involving multiple crimes, use the paragraph that specifies the crime that was the basis for the arrest as many times as needed to describe each underlying crime separately.

Give the bracketed language about entering a home under exigent circumstances if the arrest took place in the defendant’s home. (*People v. Wilkins* (1993) 14 Cal.App.4th 761, 777.)

“Peace officer,” as used in this statute, means “as defined in subdivision (a) of Section 830.1, subdivision (a), (b), or (c) of Section 830.2, subdivision (a) of Section 830.33, or Section 830.5.” (Pen. Code, § 190(b) & (c).)

The jury must determine whether the decedent was a peace officer. (*People v. Brown* (1988) 46 Cal.3d 432, 444–445.) The court may instruct the jury on the appropriate definition of “peace officer” from the statute (e.g., “a Garden Grove Regular Police Officer and a Garden Grove Reserve Police Officer are peace officers”). (*Ibid.*) However, the court may not instruct the jury that the decedent was a peace officer as a matter of law (e.g., “Officer Reed was a peace officer”). (*Ibid.*)

AUTHORITY

Second Degree Murder of a Peace Officer ▶ Pen. Code, § 190(b) & (c).

Personally Used Deadly Weapon ▶ Pen. Code, § 12022.

Personally Used Firearm ▶ Pen. Code, § 12022.5.

Personal Use ▶ Pen. Code, § 1203.06(b)(3).

1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against the Person, § 164.

STAFF NOTES

Statutory Authority

Penal Code section 190 states, in relevant part:

(b) Except as provided in subdivision (c), every person guilty of murder in the second degree shall be punished by imprisonment in the state prison for a term of 25 years to life if the victim was a peace officer, as defined in subdivision (a) of Section 830.1, subdivision (a), (b), or (c) of Section 830.2, subdivision (a) of Section 830.33, or Section 830.5, who was killed while engaged in the performance of his or her duties, and the defendant knew, or reasonably should have known, that the victim was a peace officer engaged in the performance of his or her duties.

(c) Every person guilty of murder in the second degree shall be punished by imprisonment in the state prison for a term of life without the possibility of parole if the victim was a peace officer, as defined in subdivision (a) of Section 830.1, subdivision (a), (b), or (c) of Section 830.2, subdivision (a) of Section 830.33, or Section 830.5, who was killed while engaged in the performance of his or her duties, and the defendant knew, or reasonably should have known, that the victim was a peace officer engaged in the performance of his or her duties, and any of the following facts has been charged and found true:

(1) The defendant specifically intended to kill the peace officer.

(2) The defendant specifically intended to inflict great bodily injury, as defined in Section 12022.7, on a peace officer.

(3) The defendant personally used a dangerous or deadly weapon in the commission of the offense, in violation of subdivision (b) of Section 12022.

(4) The defendant personally used a firearm in the commission of the offense, in violation of Section 12022.5.

Structure of Instruction

This instruction is based on Instruction 859, Battery Against Peace Officer, Instruction 764, Attempted Murder: Peace Officer, and Instruction 875, Assault with Deadly Weapon or Force.

Performance of Duties Requires Lawful Conduct

California cases hold that although the court, not the jury, usually decides whether police action was supported by legal cause, disputed facts bearing on the issue of legal cause must be submitted to the jury considering an engaged-in-duty element, since the lawfulness of the victim's conduct forms part of the corpus delicti of the offense.

(*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1217 [footnote omitted].)

Burden of Proof on Lawful Performance of Duties

The People have the burden of proving the lawfulness of the arrest beyond a reasonable doubt and the court must so instruct on request. (*People v. Castain* 1981) 122 Cal.App.3d 138, 145.) It is never within the scope of an officer's duties to make an unlawful arrest. (*People v. Curtis* (1969) 70 Cal.2d 347, 354.)

Personal Use

This instruction is based on *People v. Johnson* (1995) 38 Cal.App.4th 1315, 1320, and *People v. Walker* (1976) 18 Cal.3d 232, 241 [abrogated by revisions to Penal Code sections 12022 and 12022.5]. (See also *People v. Reaves* (1974) 42 Cal.App.3d 852, 857.)

Firearm Need not be Operable

"We hold that section 12022, subdivision (a), is violated by persons who, in the commission or attempted commission of a felony, are armed with an inoperable firearm if the weapon was designed to shoot and gave the reasonable appearance of a shooting capability." (*People v. Nelums* (1982) 31 Cal.3d 355, 360 [citing with approval *People v. Jackson* (1979) 92 Cal.App.3d 899, 903, which made similar holding regarding Penal code section 12022.5].) Court properly instructed jury that the firearm need not be operable under Penal Code section 12022.5. (*People v. Reza* (1981) 121 Cal.App.3d 129, 134.)

Dewberry Instruction

"[W]hen the evidence is sufficient to support a finding of guilt of both the offense charged and a lesser included offense, the jury must be instructed that if they entertain a reasonable doubt as to which offense has been committed, they must find the defendant guilty only of the lesser offense." (*People v. Dewberry* (1959) 51 Cal.2d 548, 555.) A *Dewberry* instruction is required whether the lesser-included offense is charged or uncharged. (*People v. Crone* (1997) 54 Cal.App.4th 71, 78.) For any case involving a lesser included offense, the trial court has a duty to give a *Dewberry* instruction sua sponte. (*Id.* at p. 76.) It is undecided whether the trial court has a sua sponte duty to give a *Dewberry* Instruction in the context of sentencing enhancements.

724. Second Degree Murder: Discharge From Motor Vehicle

1 **If you find the defendant guilty of second degree murder [under Count ____],**
2 **you must then determine whether the People have proved the additional**
3 **allegation that the murder was committed by shooting a firearm from a**
4 **motor vehicle.**

5
6 **To prove this additional allegation, the People must prove that:**

7
8 **1. (The defendant/_____ <insert name or description of principal if**
9 **not defendant>) shot a firearm from a motor vehicle.**

10
11 **2. (The defendant/_____ <insert name or description of principal if**
12 **not defendant>) intentionally shot at a person who was outside the**
13 **vehicle.**

14
15 **AND**

16
17 **3. When (the defendant/_____ <insert name or description of**
18 **principal if not defendant>) shot a firearm, (the defendant/_____**
19 **<insert name or description of principal if not defendant>) intended to**
20 **inflict great bodily injury on the person outside the vehicle.**

21
22 **A *firearm* is any device designed to be used as a weapon, from which a**
23 **projectile is expelled through a barrel by the force of an explosion or other**
24 **form of combustion.**

25
26 **A *motor vehicle* includes a (passenger vehicle/motorcycle/motor**
27 **scooter/bus/school bus/commercial vehicle/truck tractor and**
28 **trailer/_____ <insert other type of motor vehicle>).**

29
30 ***Great bodily injury* means significant or substantial physical injury.**

31
32 **[The People must prove that the defendant intended that the person shot at**
33 **suffer great bodily injury when (he/she/_____ <insert name or**
34 **description of principal if not defendant>) shot from the vehicle. However, the**
35 **People do not have to prove that the defendant intended to injure the specific**
36 **person who was actually killed.]**

38 **The People have the burden of proving this allegation beyond a reasonable**
39 **doubt. If the People have not met this burden, you must find that this**
40 **additional allegation has not been proved.**

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the sentencing enhancement. (See *People v. Marshall* (2000) 83 Cal.App.4th 186, 193–195 [applying *Apprendi* to firearm use enhancement]; *Apprendi v. New Jersey* (2000) 530 U.S. 466, 475–476, 490 [any fact, other than prior conviction, that increases the maximum penalty for a crime must be charged, submitted to a jury, and proved beyond a reasonable doubt].)

The statute does not specify whether the defendant must personally intend to inflict great bodily injury or whether accomplice liability may be based on a principal who intended to inflict great bodily injury even if the defendant did not. The instruction has been drafted to provide the court with both alternatives in element 3.

Give the bracketed paragraph in cases where the evidence shows that the person killed was not the person the defendant intended to harm when shooting from the vehicle. (*People v. Sanchez* (2001) 26 Cal.4th 834, 851, fn.10.)

AUTHORITY

Second Degree Murder, Discharge From Vehicle ► Pen. Code, § 190(d).

1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against the Person, § 164.

STAFF NOTES

Statutory Authority

Penal Code section 190 states, in relevant part:

(d) Every person guilty of murder in the second degree shall be punished by imprisonment in the state prison for a term of 20 years to life if the killing was perpetrated by means of shooting a firearm from a motor vehicle, intentionally at another person outside of the vehicle with the intent to inflict great bodily injury.

Is Personal Use Required?

The language of the statute, “perpetrated by means of”, is ambiguous on the issue of accomplice liability. (Pen. Code, § 190(d).) The ambiguity is highlighted by comparing this language with the language of the statutes providing for enhanced penalties for arming and personal use. (See *People v. Gutierrez* (1996) 46 Cal.App.4th 804, 813.) Penal Code section 12022 provides that the “arming” enhancement applies, “whether or not such person is personally armed with a firearm.” (Pen. Code, § 12022(a); *People v. Gutierrez, supra*, 46 Cal.App.4th at p. 813.) In contrast, Penal Code section 12022.5 provides that the “use” enhancement applies to “any person who personally uses a firearm.” (Pen. Code, § 12022.5(a); *People v. Gutierrez, supra*, 46 Cal.App.4th at p. 813.) Penal Code section 190(d), however, fails to specify whether or not vicarious liability applies.

The plain reading of the phrase “perpetrated by means of” would appear to encompass vicarious liability. On the other hand, the statute provides that the shooting must be done “intentionally at another person [. . .] with the intent to inflict great bodily injury.” If vicarious liability for the shooting is permissible under the statute based on the phrase “perpetrated by means of”, then this intent requirement also would apply only to the shooter, not to the aider and abettor. The result would be that the aider and abettor could receive the enhanced sentence for second degree murder absent a showing that the aider and abettor personally intended to inflict great bodily injury.

This issue was recently raised regarding the revised language of Penal Code section 189. Penal Code section 189 makes drive-by shootings first degree murder, using language similar to Penal Code section 190(d) but requiring intent to kill. (*People v. Chavez* (2002) 123 Cal.App.2d 576 [review granted and depublished by *People v. Chavez* (Nov. 13, 2002) 127 Cal.Rptr.2d 328, S109918].) In *Chavez, supra*, three defendants were convicted of first degree murder under the theory of drive-by shooting, one as a principal and two as aiders and abettors. The holding in the published portion of *Chavez* is that the drive-by provision included in Penal

Code section 189 is not part of the felony murder rule but instead a new basis for first degree murder. (*People v. Chavez, supra*, 123 Cal.Rptr.2d at p. 588.) In an unpublished portion of the opinion, the court addressed whether the statute required specific intent to kill on the part of an aider and abettor or solely the principal. (*Id.* at p. 598.) In granting review and depublishing the case, the Supreme Court deferred consideration of the matter until resolution of the pending case *People v. Lee* S094597. (*People v. Chavez* (Nov. 13, 2002) 127 Cal.Rptr.2d 328, S109918.) The issue in *People v. Lee* is whether an aider and abettor must personally premeditate to be liable for first degree murder. (*People v. Lee* (March 28, 2001) 105 Cal.Rptr.2d 789, S094597.)

In the recently issued opinion of *People v. Lee* (2003) 2003 DJDAR 9124, 9128, the Supreme Court held that Penal Code section 664(a) *does not* require an aider and abettor to personally premeditate and deliberate. Rather, the court concluded, the penalty enhancement applies to one convicted of attempted murder as an aider and abettor if the principal premeditated and deliberated. (*Ibid.*) In reaching this holding, the court reasoned as follows:

To begin with, as a substantive matter section 664(a) requires only that the *murder attempted* was willful, deliberate, and premeditated for an attempted murderer to be punished with life imprisonment. To quote the language of section 664(a), "if the crime attempted is willful, deliberate, and premeditated murder ..., the person guilty of that attempt shall be punished by imprisonment ... for life" Thus, section 664(a) states *only* that the murder attempted must have been willful, deliberate, and premeditated, *not* that the attempted murderer *personally* must have acted willfully and with deliberation and premeditation. Put otherwise, section 664(a) states that if the murder attempted was willful, deliberate, and premeditated, any "person guilty of that attempt"--*not* confined to persons *who acted willfully and with deliberation and premeditation*--"shall be punished by imprisonment ... for life." Of course, a person may be guilty of attempted murder or indeed of any crime, on varying bases and with varying mental states, depending, for example, on whether he or she was a direct perpetrator or an aider and abettor or even a conspirator.

Referring three times broadly and generally to "the person guilty" of attempted murder, section 664(a) not once distinguishes between an attempted murderer who is guilty as a direct perpetrator and an attempted murderer who is guilty as an aider and abettor, and not once requires of an attempted murderer personal willfulness, deliberation, and premeditation. Had the Legislature intended to draw a distinction between direct perpetrators and aiders and

abettors, it certainly could have done so expressly.

(*People v. Lee, supra*, 2003 DJDAR at p. 9126 [emphasis in original].)

The court then compared the language of section 664(a) with the language of other penalty enhancements, quoted above, concluding:

[S]ection 664(a) does *not* require that an attempted murderer personally act with willfulness, deliberation, and premeditation. It requires only that the attempted murder itself was willful, deliberate, and premeditated. Contrary to the provisions that we considered in *Walker, Cole*, and *Piper*, which required certain personal conduct on the part of a person committing a crime, that is the person's use of a firearm, infliction of great bodily injury, or use of a dangerous or deadly weapon, section 664(a) requires only a certain quality characterizing the crime itself, that is that the attempted murder was willful, deliberate, and premeditated. In *Piper*, we implied that if the Legislature had included language in section 1192.7(c) referring to "any felony in which a firearm was used," instead of "any felony in which the defendant use[d] a firearm," it would have revealed an intent not to require personal use. Here, in our view, the Legislature's inclusion in section 664(a) of language referring to the murder attempted as willful, deliberate, and premeditated, instead of to the attempted murderer as personally acting with willfulness, deliberation and premeditation, reveals an intent not to require personal willfulness, deliberation, and premeditation.

(*People v. Lee, supra*, 2003 DJDAR at p. 9128 [emphasis in original].)

However, the court further noted that to be convicted as an aider and abettor, the defendant must share the intent of the principal. (*Ibid.*) "When the crime at issue requires a specific intent, in order to be guilty as an aider and abettor the person must share the specific intent of the direct perpetrator, that is to say, the person must know the full extent of the direct perpetrator's criminal purpose and must give aid or encouragement with the intent or purpose of facilitating the direct perpetrator's commission of the crime." (*Ibid.*) The court observed that although an aider and abettor does not have to premeditate personally to come within the bounds of Penal Code section 664(a), he or she does still have to share the intent to kill. (*Ibid.*) Thus, the statute did not reach too broadly in punishing accomplices to attempted murder.

The statute at issue here, Penal Code section 190(d), uses a construction similar to that of Penal Code section 664(a). Penal Code section 190(d) states,

Every person guilty of murder in the second degree shall be punished by imprisonment in the state prison for a term of 20 years to life if the killing was perpetrated by means of shooting a firearm from a motor vehicle, intentionally at another person outside of the vehicle with the intent to inflict great bodily injury.

As in Penal Code section 664(a), the statute at issue here provides for the increased punishment for “every person guilty of murder” when the murder is committed in the proscribed manner. The statute requires only that the murder be committed in the manner stated, not that the person convicted personally use a weapon or personally intend to inflict great bodily injury. Thus, based on the reasoning of *People v. Lee*, Penal Code section 190(d) also provides for vicarious liability and does not require that the defendant personally shoot the firearm. However, because accomplice liability still requires that the aider and abettor share the mental state of the principal, liability under Penal Code section 190(d) might still require a showing that the defendant intended to inflict great bodily injury.

Because the issue is undecided, the Task Force has drafted the instruction to provide the court with both options.

Motor Vehicle Defined

The definition of motor vehicle in this instruction is copied from Instruction 891, Shooting at Inhabited House or Occupied Vehicle, which is adapted from the definition of vehicle in Instruction 1316, Unlawful Taking or Driving of Vehicle.

Dewberry Instruction

“[W]hen the evidence is sufficient to support a finding of guilt of both the offense charged and a lesser included offense, the jury must be instructed that if they entertain a reasonable doubt as to which offense has been committed, they must find the defendant guilty only of the lesser offense.” (*People v. Dewberry* (1959) 51 Cal.2d 548, 555.) A *Dewberry* instruction is required whether the lesser-included offense is charged or uncharged. (*People v. Crone* (1997) 54 Cal.App.4th 71, 78.) For any case involving a lesser included offense, the trial court has a duty to give a *Dewberry* instruction sua sponte. (*Id.* at p. 76.) It is undecided whether the trial court has a sua sponte duty to give a *Dewberry* Instruction in the context of sentencing enhancements.

730. Felony Murder: First Degree

1 **The defendant is charged [in Count ____] with first degree murder, under a**
2 **theory of felony murder.**

3
4 **To prove that the defendant is guilty of this crime, the People must prove**
5 **that:**

6
7 **1. The defendant committed [or attempted to commit] _____**
8 **<insert felony from Pen. Code, § 189, except mayhem>.**

9
10 **AND**

11
12 **2. During the commission [or attempted commission] of _____**
13 **<insert felony>, _____<insert name or description of decedent>**
14 **was (killed/fatally injured).**

15
16 **The defendant committed [or attempted to commit] _____ <insert**
17 **felony> if:**

18
19 **<INSERT THE NUMBERED ELEMENTS OF THE UNDERLYING**
20 **FELONY.>**

21
22 **A person may be guilty of felony murder even if the killing was unintentional,**
23 **accidental, or negligent.**

24
25 **[The defendant must have intended to commit the felony of _____**
26 **<insert underlying felony> before or at the time of the (killing/fatal injury).]**

27
28 **[A killing occurs during the commission or attempted commission of**
29 **_____ <insert underlying felony> even if the victim does not die**
30 **immediately, so long as the fatal injury is inflicted during the commission of**
31 **the felony.]**

32
33 **[The person killed does not need to be the (victim/intended victim) of the**
34 **underlying felony.]**

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime. The court also has a **sua sponte** duty to instruct on the elements of the underlying felony. (*People v. Cain* (1995) 10 Cal.4th 1, 36.)

If the underlying felony is mayhem, give Instruction 732, Felony Murder: Murder by Mayhem. If the victim is fatally injured and dies at a later time, instruct with “fatally injured” instead of “killed” in the second element.

The other felonies that support a charge of first degree felony murder are arson, rape, carjacking, robbery, burglary, kidnapping, train wrecking, sodomy, lewd or lascivious acts on a child, oral copulation, and sexual penetration. (See Pen. Code, § 189.)

If there is evidence that the defendant did not form the intent to commit the felony until after the homicide, the defendant is entitled on request to an instruction pinpointing this issue. (*People v. Hudson* (1955) 45 Cal.2d 121, 124–127; *People v. Silva* (2001) 25 Cal.4th 345, 371.)

A person is normally not guilty of felony murder for killings committed during the felony by a person other than the defendant or his or her accomplice. (*People v. Washington* (1965) 62 Cal.2d 777, 782–783; *People v. Caldwell* (1984) 36 Cal.3d 210, 216; see also *People v. Gardner* (1995) 37 Cal.App.4th 473, 477.) Liability may be imposed, however, under the provocative act doctrine when the underlying felony does not require an intent to kill and the killing is a natural and probable consequence of defendant’s provocative act. (*Pizano v. Superior Court of Tulare County* (1978) 21 Cal.3d 128, 134; see Instruction 740, Homicide: Provocative Act by Defendant.)

Related Instructions

If the People rely on an aiding and abetting theory, the court should give Instruction 733, First Degree Felony Murder: Aiding and Abetting. (See *People v. Pulido* (1997) 15 Cal.4th 713; *People v. Esquivel* (1994) 28 Cal.App.4th 1386; *People v. Anderson* (1991) 233 Cal.App.3d 1646, 1656.) If the evidence indicates the defendant may have been either the principal or an aider and abettor, give this instruction and Instruction 733.

If the prosecutor is proceeding under both malice and felony murder theories, the court should also give Instruction 737, Malice Versus Felony Murder. If the prosecutor is relying only on a theory of felony murder, no instruction on malice

should be given. (See *People v. Cain* (1995) 10 Cal.4th 1, 35–37 [error to instruct on malice when felony murder only theory].)

Felony murder requires that the killing and felony occur as parts of a continuous transaction. (*People v. Whitehorn* (1963) 60 Cal.2d 256, 264 [rape case].) Give the appropriate portion of Instruction 738, Felony Murder: “During Commission of Felony—Defined, with this instruction.

AUTHORITY

Enumerated Felonies ▶ Pen. Code, § 189.

Continuous Transaction Requirement ▶ *People v. Whitehorn* (1963) 60 Cal.2d 256, 264; *People v. Hernandez* (1988) 47 Cal.3d 315, 348.

Infliction of Fatal Injury ▶ *People v. Alvarez* (1996) 14 Cal.4th 155, 222–223.

Intent ▶ *People v. Sears* (1965) 62 Cal.2d 737, 745, overruled on other grounds in *People v. Cahill* (1993) 5 Cal.4th 478, 509, fn. 17; *People v. Esquivel* (1994) 28 Cal.App.4th 1386, 1396.

1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against the Person, §§ 134–147.

LESSER INCLUDED OFFENSES

Second Degree Murder ▶ Pen. Code, § 187.

Voluntary Manslaughter ▶ Pen. Code, § 192(a).

Involuntary Manslaughter ▶ Pen. Code, § 192(b).

Attempted Murder ▶ Pen. Code, §§ 663, 189.

RELATED ISSUES

Underlying Felony and Attempted Underlying Felony Not Lesser Included
“Although a trial court on its own initiative must instruct the jury on lesser included offenses of *charged* offenses, this duty does not extend to *uncharged* offenses relevant only as predicate offenses under the felony-murder doctrine.” (*People v. Silva* (2001) 25 Cal.4th 345, 371 [original italics]; see *People v. Cash* (2002) 28 Cal.4th 703, 736–737 [no duty to instruct on theft as lesser included offense of uncharged predicate offense of robbery].)

Auto Burglary

Auto burglary may form the basis for a first degree felony murder conviction. (*People v. Fuller* (1978) 86 Cal.App.3d 618, 622–623, 628 [noting the problems of applying the felony murder rule to a nondangerous daytime auto burglary].)

Decedent Does Not Need to Be a Victim of the Underlying Felony

The felony murder rule does not require that the person killed be the victim of the underlying felony. The doctrine applies if the person killed is an accomplice (*People v. Johnson* (1972) 28 Cal.App.3d 653, 658), an innocent bystander (*People v. Welch* (1972) 8 Cal.3d 106, 117–119), or a police officer arriving on the scene (*People v. Salas* (1972) 7 Cal.3d 812, 823). See Instruction 733, First Degree Felony Murder: Aiding and Abetting.

Drive-By Shooting

The drive-by shooting clause in Penal Code section 189 is not an enumerated felony for purposes of the felony murder rule. A finding of a specific intent to kill is required in order to find guilt of first degree murder under this clause. (*People v. Chavez* (2002) 100 Cal.App.4th 88, __ REVIEW GRANTED AND DEPUBLISHED, S109918; see Instruction 721, Murder: Degrees.)

Duress

“[D]uress can, in effect, provide a defense to murder on a felony-murder theory by negating the underlying felony.” (*People v. Anderson* (2002) 28 Cal.4th 767, 784 [dictum]; see also Instruction 610, Duress or Threats [duress not a defense to murder].)

Heart Attack

Felony murder has been upheld where the victim died of a heart attack either during or after the perpetration of the felony. (*People v. Stamp* (1969) 2 Cal.App.3d 203, 209–211 [after]; *People v. Hernandez* (1985) 169 Cal.App.3d 282, 287 [during]; but see *People v. Gunnerson* (1977) 74 Cal.App.3d 370, 378–381 [a simultaneous or coincidental death is not a killing].)

Imperfect Self-Defense

Imperfect self-defense is not a defense to felony murder because malice aforethought, which it negates, is not an element of felony murder. (*People v. Tabios* (1998) 67 Cal.App.4th 1, 6–9.)

Merger: Ireland Rule

In *People v. Ireland* the court held that assault could not form the basis of a charge for second degree felony murder because the assaultive conduct “merges” with the homicide. (*People v. Ireland* (1969) 70 Cal.2d 522, 539–540 [merger based on assault with a deadly weapon].) Although merger is typically an issue in second degree felony murder, in *People v. Garrison* (1989) 47 Cal.3d 746, 778, the court held that first degree felony murder cannot be based on a burglary where the intent on entry is to commit an assault. (For further discussion, see the Related Issues section under Instruction 731, Felony Murder: Second Degree.)

731. Felony Murder: Second Degree

1 **The defendant is charged [in Count ____] with second degree murder, under a**
2 **theory of felony murder.**

3
4 **To prove that the defendant is guilty of this crime, the People must prove**
5 **that:**

6
7 **1. The defendant committed [or attempted to commit] _____**
8 **<insert inherently dangerous felony>.**

9
10 **AND**

11
12 **2. During the commission [or attempted commission] of the**
13 **_____ <insert felony>, _____ <insert name or description**
14 **of decedent> was (killed/fatally injured).**

15
16 **The defendant committed [or attempted to commit] _____ <insert**
17 **felony> if:**

18
19 **<INSERT THE NUMBERED ELEMENTS OF THE UNDERLYING**
20 **FELONY.>**

21
22 **A person may be guilty of felony murder even if the killing was unintentional,**
23 **accidental, or negligent.**

24
25 **[The defendant must have intended to commit the felony of _____**
26 **<insert underlying felony> before or at the time of the (killing/fatal injury).]**

27
28 **[A killing occurs during the commission or attempted commission of**
29 **_____ <insert underlying felony> even if the victim does not die**
30 **immediately, so long as the fatal injury is inflicted during the felony.]**

31
32 **[The person killed does not need to have been the (victim/intended victim) of**
33 **the underlying felony.]**

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime. The court also has a **sua sponte** duty to instruct on the elements of the underlying felony. (*People v. Cain* (1995) 10 Cal.4th 1, 36.) If the victim is fatally injured and dies at a later time, instruct with “fatally injured” instead of “killed” in element 2.

If there is evidence that the defendant did not form the intent to commit the felony until after the homicide, the defendant is entitled on request to an instruction pinpointing this issue. (*People v. Hudson* (1955) 45 Cal.2d 121, 124–127; *People v. Silva* (2001) 25 Cal.4th 345, 371.)

A person is not guilty of felony murder for killings committed during the felony by a person other than the defendant or his or her accomplice. (*People v. Washington* (1965) 62 Cal.2d 777, 782–783; *People v. Caldwell* (1984) 36 Cal.3d 210, 216; see also *People v. Gardner* (1995) 37 Cal.App.4th 473, 477.) Liability may be imposed, however, under the provocative act doctrine when the underlying felony does not require an intent to kill and the killing is a natural and probable consequence of defendant’s provocative act. (*Pizano v. Superior Court of Tulare County* (1978) 21 Cal.3d 128, 134; see Instruction 740, Homicide: Provocative Act by Defendant.)

Related Instructions

If the People rely on an aiding and abetting theory, give Instruction 734, Second Degree Felony Murder: Aiding and Abetting. (See *People v. Pulido* (1997) 15 Cal.4th 713; *People v. Esquivel* (1994) 28 Cal.App.4th 1386; *People v. Anderson* (1991) 233 Cal.App.3d 1646, 1656.) If the evidence indicates the defendant may have been either the principal or an aider and abettor, give this instruction and Instruction 734.

If the prosecutor is proceeding under both malice and felony murder theories, the court should also give instruction 737, Malice Versus Felony Murder. If the prosecutor is relying only on a theory of felony murder, no instruction on malice should be given. (See *People v. Cain* (1995) 10 Cal.4th 1, 35–37 [error to instruct on malice when only felony murder charged].)

Felony murder requires that the killing and felony occur as parts of a continuous transaction. (*People v. Whitehorn* (1963) 60 Cal.2d 256, 264 [discussing requirement in context of rape].) Give the appropriate portion of Instruction 738, Felony Murder: During Commission of Felony—Defined, with this instruction.

AUTHORITY

Continuous Transaction Requirement ▶ *People v. Whitehorn* (1963) 60 Cal.2d 256, 264; *People v. Hernandez* (1988) 47 Cal.3d 315, 348.

Infliction of Fatal Injury ▶ *People v. Alvarez* (1996) 14 Cal.4th 155, 222–223.

Inherently Dangerous Felonies ▶ *People v. Satchell* (1971) 6 Cal.3d 28, 33–41 [overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 484]; *People v. Henderson* (1977) 19 Cal.3d 86, 93 [overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 484]; *People v. Patterson* (1989) 49 Cal.3d 615, 622–625.

Intent ▶ *People v. Sears* (1965) 62 Cal.2d 737, 745 [overruled on other grounds in *People v. Cahill* (1993) 5 Cal.4th 478, 509, fn. 17]; *People v. Esquivel* (1994) 28 Cal.App.4th 1386, 1396.

1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against the Person, §§ 134–147.

LESSER INCLUDED OFFENSES

Voluntary Manslaughter ▶ Pen. Code, § 192(a).

Involuntary Manslaughter ▶ Pen. Code, § 192(b).

Attempted Murder ▶ Pen. Code, §§ 663, 189.

RELATED ISSUES

See generally, the Related Issues section under Instruction 730, Felony Murder: First Degree.

Underlying Felony and Attempted Underlying Felony Not Lesser Included
“Although a trial court on its own initiative must instruct the jury on lesser included offenses of *charged* offenses, this duty does not extend to *uncharged* offenses relevant only as predicate offenses under the felony-murder doctrine.” (*People v. Silva* (2001) 25 Cal.4th 345, 371 [original italics]; see *People v. Cash* (2002) 28 Cal.4th 703, 736–737 [no duty to instruct on theft as lesser included offense of uncharged predicate offense of robbery].)

Merger: Ireland Rule

Assault or assault with a deadly weapon cannot form the basis for a charge of second degree felony murder because the assaultive conduct “merges” with the homicide. (*People v. Ireland* (1969) 70 Cal.2d 522, 539–540 [merger based on assault with a deadly weapon]; see also *People v. Garrison* (1989) 47 Cal.3d 746, 778 [first degree felony murder cannot be based on burglary where intent on entry

is to commit assault].) Because most homicides result from assaultive conduct, permitting prosecution under the felony murder rule would automatically elevate most homicides to murder. (*People v. Ireland*, *supra*, 70 Cal.2d at pp. 539–540.) The Supreme Court has rejected specific tests designed to determine whether a felony falls within the doctrine and instead has applied a policy analysis in deciding the issue. (*People v. Hansen* (1994) 9 Cal.4th 300, 311–315 [court looks at effect of including felony within the doctrine and whether permitting inclusion would frustrate legislative intent behind felony murder].) There is a split of authority on whether negligent discharge of a firearm (Pen. Code, § 246.3) may serve as the basis for second degree felony murder. (See *People v. Robertson* (2003) 109 Cal.App.4th 1740 [holding that it cannot under the merger doctrine, REVIEW GRANTED AND DEPUBLISHED, Oct. 1, 2003, S118034]; *People v. Randle* (2003) 109 Cal.App.4th 313 [holding that it can, REVIEW GRANTED AND DEPUBLISHED Aug. 27, 2003, S117370].)

Second Degree Felony Murder: Inherently Dangerous Felonies

The second degree felony murder doctrine is triggered when a homicide occurs during the commission of a felony that is inherently dangerous to human life. (*People v. Satchell* (1971) 6 Cal.3d 28, 33–41 and *People v. Henderson* (1977) 19 Cal.3d 86, 93 [both overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 484].) In *People v. Burroughs* (1984) 35 Cal.3d 824, 833, the court described an inherently dangerous felony as one that cannot be committed without creating a substantial risk that someone will be killed. However, in *People v. Patterson* (1989) 49 Cal.3d 615, 618, 626–627, the court defined an inherently dangerous felony as “an offense carrying a high probability that death will result.” (See *People v. Coleman* (1992) 5 Cal.App.4th 646, 649–650 [court explicitly adopts *Patterson* definition of inherently dangerous felony].)

Whether a felony is inherently dangerous is a legal question for the court to determine. In making this determination, the court should assess “the elements of the felony in the abstract, not the particular facts of the case,” and consider the statutory definition of the felony in its entirety. (*People v. Satchell*, *supra*, 6 Cal.3d at p. 36; *People v. Henderson*, *supra*, 19 Cal.3d at pp. 93–94.) If the statute at issue prohibits a diverse range of conduct, the court must analyze whether the entire statute or only the part relating to the specific conduct at issue is applicable. (See *People v. Patterson*, *supra*, 49 Cal.3d at pp. 622–625 [analyzing Health & Saf. Code, §11352, which prohibits range of drug-related behavior, and holding that only conduct at issue should be considered when determining dangerousness].)

The following felonies have been found inherently dangerous for purposes of second degree felony murder:

Attempted Escape From Prison by Force or Violence ▶ Pen. Code, § 4530; *People v. Lynn* (1971) 16 Cal.App.3d 259, 272; *People v. Snyder* (1989) 208 Cal.App.3d 1141, 1143–1146.

Eluding Police Officer by Driving in Willful Disregard for Safety ▶ Veh. Code, § 2800.2; *People v. Johnson* (1993) 15 Cal.App.4th 169, 173–174.

Furnishing Poisonous Substance ▶ Pen. Code, § 347; *People v. Mattison* (1971) 4 Cal.3d 177, 182–184.

Kidnapping for Ransom, Extortion, or Reward ▶ Pen. Code, § 209(a); *People v. Ordonez* (1991) 226 Cal.App.3d 1207, 1227–1228.

Manufacturing Methamphetamine ▶ Health & Saf. Code, § 11379.6(a); *People v. James* (1998) 62 Cal.App.4th 244, 270–271.

Reckless Possession of Bomb ▶ Pen. Code, § 12303.2; *People v. Morse* (1992) 2 Cal.App.4th 620, 646, 655.

Shooting Firearm in Grossly Negligent Manner ▶ Pen. Code, § 246.3; *People v. Clem* (2000) 78 Cal.App.4th 346, 351 (but split in authority on whether merger doctrine applies, see *People v. Robertson* (2003) 109 Cal.App.4th 1740 [holding merger doctrine applies, REVIEW GRANTED AND DEPUBLISHED, Oct. 1, 2003, S118034]; *People v. Randle* (2003) 109 Cal.App.4th 313 [holding merger doctrine does not apply, REVIEW GRANTED AND DEPUBLISHED Aug. 27, 2003, S117370].)

Shooting at Inhabited Dwelling ▶ Pen. Code, § 246; *People v. Tabios* (1998) 67 Cal.App.4th 1, 9–10.

Shooting at Occupied Vehicle ▶ Pen. Code, § 246; *People v. Tabios* (1998) 67 Cal.App.4th 1, 10–11.

Shooting From Vehicle at Inhabited Dwelling ▶ *People v. Hansen* (1994) 9 Cal.4th 300, 311.

The following felonies have been found to be *not* inherently dangerous for purposes of second degree felony murder:

Conspiracy to Possess Methedrine ▶ *People v. Williams* (1965) 63 Cal.2d 452, 458.

Extortion ▶ Pen. Code, §§ 518, 519; *People v. Smith* (1998) 62 Cal.App.4th 1233, 1237–1238.

False Imprisonment ▶ Pen. Code, § 236; *People v. Henderson* (1977) 19 Cal.3d 86, 92–96 [overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 484].

Felon in Possession of Firearm ▶ Pen. Code, § 12021; *People v. Satchell* (1971) 6 Cal.3d 28, 39–41 [overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 484].

Felonious Practice of Medicine Without License ▶ *People v. Burroughs* (1984) 35 Cal.3d 824, 830–833.

Felony Child Abuse ▶ Pen. Code, § 273a; *People v. Lee* (1991) 234 Cal.App.3d 1214, 1228.

Felony Escape From Prison Without Force or Violence ▶ Pen. Code, § 4530(b); *People v. Lopez* (1971) 6 Cal.3d 45, 51–52.

Felony Evasion of Peace Officer ▶ Veh. Code, § 2800.3; *People v. Sanchez* (2001) 86 Cal.App.4th 970, 979–980.

Furnishing PCP ▶ Health & Saf. Code, § 11379.5; *People v. Taylor* (1992) 6 Cal.App.4th 1084, 1100–1101.

Grand Theft False Pretenses ▶ *People v. Phillips* (1966) 64 Cal.2d 574 [overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 484].

Grand Theft From the Person ▶ Pen. Code, § 487.2; *People v. Morales* (1975) 49 Cal.App.3d 134, 142–143.

732. Felony Murder: Murder by Mayhem

1 The defendant is charged [in Count ____] with first degree murder, under a
2 theory of felony murder.

3
4 To prove that the defendant is guilty of this crime, the People must prove
5 that:

6
7 1. The defendant committed [or attempted to commit] mayhem.

8
9 2. The defendant intended to commit mayhem.

10
11 AND

12
13 3. During the commission [or attempted commission] of mayhem,
14 _____ <insert name or description of decedent> was
15 (killed/fatally injured).

16
17 The defendant committed [or attempted to commit] mayhem if (he/she)
18 unlawfully and maliciously did [or attempted to do] any one of the following:

19
20 A. Removed a part of someone's body;

21
22 B. Disabled, disfigured, or made useless a part of someone's body;

23
24 OR

25
26 C. Cut or disabled the tongue, put out an eye, or slit the nose, ear, or
27 lip of someone.

28
29 The defendant acted *maliciously* if (he/she) intended to annoy or injure
30 someone.

31
32 A person may be guilty of felony murder even if the killing was unintentional,
33 accidental, or negligent.

34
35 [The defendant must have intended to commit mayhem before or at the time
36 of the (killing/fatal injury).]
37

38 [A killing occurs during the commission [or attempted commission] of
39 mayhem even if the victim does not die immediately, so long as the fatal
40 injury is inflicted during the commission of mayhem.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime. The court also has a **sua sponte** duty to instruct on the elements of mayhem. (*People v. Cain* (1995) 10 Cal.4th 1, 36.) If the victim is fatally injured and dies at a later time, instruct with “fatally injured” instead of “killed” in element 3.

If there is evidence that the defendant did not form the intent to commit the felony until after the homicide, the defendant is entitled on request to an instruction pinpointing this issue. (*People v. Hudson* (1955) 45 Cal.2d 121, 124–127; *People v. Silva* (2001) 25 Cal.4th 345, 371.)

A person is not guilty of felony murder for killings committed during the felony by a person other than the defendant or his or her accomplice. (*People v. Washington* (1965) 62 Cal.2d 777, 782–783; *People v. Caldwell* (1984) 36 Cal.3d 210, 216; see also *People v. Gardner* (1995) 37 Cal.App.4th 473, 477.) Liability may be imposed, however, under the provocative act doctrine when the underlying felony does not require an intent to kill and the killing is a natural and probable consequence of defendant’s provocative act. (See Instruction 740, Homicide: Provocative Act by Defendant.)

Related Instructions

If the People rely on an aiding and abetting theory, the court should give instruction 733, First Degree Felony Murder: Aiding and Abetting. (See *People v. Pulido* (1997) 15 Cal.4th 713; *People v. Esquivel* (1994) 28 Cal.App.4th 1386; *People v. Anderson* (1991) 233 Cal.App.3d 1646, 1656.) If the evidence indicates the defendant may have been either the principal or an aider and abettor, give this instruction and Instruction 733.

If the prosecutor is proceeding under both malice and felony murder theories, the court should also give Instruction 737, Malice Versus Felony Murder. If the prosecutor is relying only on a theory of felony murder, no instruction on malice should be given. (See *People v. Cain* (1995) 10 Cal.4th 1, 35–37 [error to instruct on malice when felony murder only theory].)

Felony murder requires that the killing and felony occur as parts of a continuous transaction. (*People v. Whitehorn* (1963) 60 Cal.2d 256, 264 [rape case].) Give the appropriate portion of Instruction 738, Felony Murder: During Commission of Felony—Defined, with this instruction.

For an instruction defining mayhem under Penal Code section 203, see Instruction 915, Mayhem.

AUTHORITY

Enumerated Felonies ▶ Pen. Code, § 189.

Continuous Transaction Requirement ▶ *People v. Whitehorn* (1963) 60 Cal.2d 256, 264; *People v. Hernandez* (1988) 47 Cal.3d 315, 348.

Infliction of Fatal Injury ▶ *People v. Alvarez* (1996) 14 Cal.4th 155, 222–223.

Intent ▶ *People v. Sears* (1965) 62 Cal.2d 737, 745 [overruled on other grounds in *People v. Cahill* (1993) 5 Cal.4th 478, 509]; *People v. Esquivel* (1994) 28 Cal.App.4th 1386, 1396.

1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against the Person, §§ 134–160.

LESSER INCLUDED OFFENSES

Second Degree Murder ▶ Pen. Code, § 187.

Voluntary Manslaughter ▶ Pen. Code, § 192(a).

Involuntary Manslaughter ▶ Pen. Code, § 192(b).

Attempted Murder ▶ Pen. Code, §§ 663, 189.

COMMENTARY

The committee decided to include a separate instruction on murder by mayhem. Unlike the other felony murders, murder by mayhem requires the additional element of intent to commit mayhem.

RELATED ISSUES

See generally, the Related Issues section under Instruction 730, Felony Murder: First Degree.

733. First Degree Felony Murder: Aiding and Abetting

1 <IF THE PEOPLE'S THEORY IS THAT THE DEFENDANT WAS ALSO A
2 DIRECT PERPETRATOR, GIVE INSTRUCTION 730, FELONY MURDER:
3 FIRST DEGREE.>

4
5 **The defendant is [also] guilty of first degree felony murder if (he/she) aided**
6 **and abetted another person, whom I will call the *perpetrator*, in the**
7 **commission [or attempted commission] of _____** *<insert felony alleged*
8 *from Pen. Code, § 189>* **and if during the commission of that crime**
9 **_____** *<insert name or description of decedent>* **was (killed/fatally**
10 **injured). To convict the defendant as an aider and abettor, the People must**
11 **prove that:**

- 12
13 1. **The perpetrator committed [or attempted to commit] _____**
14 *<insert felony from Pen. Code, § 189>*.
15
16 2. **The defendant knew that the perpetrator intended to commit**
17 **_____** *<insert felony from Pen. Code, § 189>*.
18
19 3. **The defendant did or said something that did in fact aid and abet**
20 **the perpetrator's commission [or attempted commission] of**
21 **_____** *<insert felony from Pen. Code, § 189>*.
22
23 4. **When the defendant acted, (he/she) intended to aid and abet the**
24 **perpetrator's commission of _____** *<insert felony from Pen.*
25 *Code, § 189>*.
26

27 **AND**

- 28
29 5. **_____** *<insert name or description of decedent>* **was killed**
30 **during the commission [or attempted commission] of the**
31 **_____** *<insert felony from Pen. Code, § 189>*.
32

33 **A person may be guilty of felony murder even if the killing was unintentional,**
34 **accidental, or negligent.**

35
36 **Someone *aids and abets* a crime if, before or during the commission of the**
37 **crime, he or she intentionally aids, facilitates, promotes, encourages, or**
38 **instigates the perpetrator's commission of that crime.**
39

If the People have proved each of the five elements I have just listed, the defendant does not need to have been actually present when the crime was committed [or attempted] to be guilty as an aider and abettor.

[The perpetrator committed [or attempted to commit] _____ *<insert underlying felony>* if (he/she):

<INSERT ELEMENTS OF UNDERLYING FELONY, SUBSTITUTING “PERPETRATOR” FOR “DEFENDANT”>.]

[A killing occurs during the commission or attempted commission of _____ *<insert underlying felony>* even if the victim does not die immediately, so long as the fatal injury is inflicted during the commission of that crime.]

[The person killed does not need to have been the (victim/intended victim) of the underlying felony.]

[The fact that a person is present at the scene of a crime or fails to prevent the crime does not by itself make him or her an aider and abettor. If you conclude that the defendant was present at the scene of the crime or failed to prevent the crime, you may consider that fact in determining whether the defendant was an aider and abettor. However, the mere presence at the scene of the crime or failure to prevent the crime does not by itself constitute aiding and abetting.]

[A person who aids and abets a crime is not guilty of that crime if he or she withdraws before the crime is committed. To withdraw, a person must do two things:

1. He or she must notify everyone else who he or she knows is involved in the commission of the crime that he or she is no longer participating. The notification must be made early enough to prevent the commission of the crime.

AND

2. He or she must do everything reasonably within his or her power to prevent the crime from being committed. However, he or she does not have to actually prevent the crime.

81 **The People have the burden of proving beyond a reasonable doubt that the**
82 **defendant did not withdraw. If the People have not met this burden, you must**
83 **find the defendant not guilty of aiding and abetting felony murder.]**

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on aiding and abetting when the prosecution relies on this theory of culpability. (*People v. Beeman* (1984) 35 Cal.3d 547, 560–561.)

The felonies that support a charge of first degree felony murder are arson, rape, carjacking, robbery, burglary, kidnapping, mayhem, train wrecking, sodomy, oral copulation, sexual penetration, and lewd or lascivious acts on a child. (See Pen. Code, § 189; *People v. Baker* (1999) 74 Cal.App.4th 243, 248–250.)

Related Instructions

Instruction 500, Aiding and Abetting: General Principles.

Instruction 730, Felony Murder: First Degree.

Instruction 732, Felony Murder: Murder by Mayhem.

Instruction 734, Second Degree Felony Murder: Aiding and Abetting.

Felony murder requires that the killing and felony occur as parts of a continuous transaction. (*People v. Whitehorn* (1963) 60 Cal.2d 256, 264 [rape case].) Give the appropriate portion of Instruction 738, Felony Murder: During Commission of Felony—Defined, with this instruction.

AUTHORITY

Felony Murder ▶ Pen. Code, § 189.

Principals of Crime Include Aider and Abettor ▶ Pen. Code, § 31.

Shared Specific Intent ▶ *People v. Beeman* (1984) 35 Cal.3d 547, 560.

Defendant Must Join Felonious Enterprise Before or During Killing of
Victim ▶ *People v. Pulido* (1997) 15 Cal.4th 713, 726.

1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Introduction to Crimes, §
80, p. 128; § 87, p. 138; Crimes Against the Person, § 156, p. 770.

RELATED ISSUES

Accidental Death of Accomplice in During Commission of Arson

In *People v. Ferlin* (1928) 203 Cal. 587, 596–597, the court held that an aider and abettor is not liable for the accidental death of an accomplice to arson when (1) the defendant was neither present nor actively participating in the arson when it was committed; (2) the accomplice acted alone in actually perpetrating the arson; and (3) the accomplice killed only himself or herself and not another person. More recently, the court stated,

We conclude that felony-murder liability for any death in the course of arson attaches to all accomplices in the felony at least where, as here, one or more surviving accomplices were present at the scene and active participants in the crime. We need not decide here whether *Ferlin* was correct on its facts.

(*People v. Billa* (2003) 31 Cal.4th 1064, 1072.)

STAFF NOTES

This instruction is a hybrid of the first degree felony murder and aiding and abetting instructions, which are the source of virtually all its language, with the exception of paragraph 3, which comes from *People v. Beeman* (1984) 35 Cal.3d 547, 560:

[A]n aider and abettor will ‘share’ the perpetrator’s specific intent when he or she knows the full extent of the perpetrator’s criminal purpose and gives aid or encouragement with the intent or purpose of facilitating the perpetrator’s commission of the crime.

Furthering Common Criminal Purpose or Jointly Engaged in Criminal Enterprise

Review currently pending in *People v. Cavitt*, S105058 (A081492, A088117 [unpublished opinion]) on:

- (1) Is an accomplice liable for first degree murder under the felony-murder rule whenever a killing is committed while the accomplice and the actual killer are **jointly engaged** in a felony implicating the felony-murder rule, or is an accomplice liable only where the killing is committed in **furtherance of a common purpose or design** to commit the underlying felony? (See *People v. Pulido* (1997) 15 Cal.4th 713, 721-722 & fn. 2.)
- (2) Does the principle terminating liability under the felony-murder rule when the perpetrators of the underlying felony have attained a place of temporary safety apply where only some perpetrators have reached such a place and the killing is thereafter committed by a perpetrator who has not reached a place of temporary safety?
- (3) Did the trial court prejudicially err in precluding defendants from presenting evidence establishing that a cohort harbored **independent animus** for purposes of first-degree felony murder?

In *People v. Smithson* (2000) 79 Cal.App.4th 480, 500–501, the court recognized that an aider and abettor’s scope of complicity have been described in two different ways:

In *People v. Pulido* (1997) 15 Cal.4th 713 [. . .], the Supreme Court acknowledged that its past “descriptions of an accomplice’s liability [under the felony-murder rule] have limited complicity to killings occurring while the killer was acting in furtherance of a criminal purpose common to himself and the accomplice [see *People v. Washington* (1965) 62 Cal.2d

777 [. . .]; *People v. Vasquez* (1875) 49 Cal. 560], or while the killer and accomplice were jointly engaged in the felonious enterprise [see *People v. Martin* (1938) 12 Cal.2d 466 [. . .]; *People v. Perry* (1925) [. . .]” (*People v. Pulido, supra*, 15 Cal.4th at p. 719.)

Under the first line of cases, accomplice liability arises when the killing is committed “ ‘in furtherance of their common purpose to rob.’ [Citations.]” (*People v. Pulido, supra*, [. . .]) Under the second line, “the killing need have no particular causal or logical relationship to the common scheme of robbery; accomplice liability attaches, instead, for any killing committed while the accomplice and killer are ‘jointly engaged’ in the robbery. [Citations.]” (*Id.* at p. 722.)

The *Pulido* court did not determine whether one of these lines of cases was no longer controlling. However, Spence claims the *Pulido* court has shown an intent to favor only the first line. Thus, he argues we should apply the felony-murder rule only where the killing occurs in furtherance of the defendants' common purpose to rob. Further, he asserts an accidental killing cannot, as a matter of logic, be committed in furtherance of a common purpose, and thus should not trigger liability under the felony-murder rule. We reject both of Spence's claims.

First, because the *Pulido* court did not disapprove either line of felony-murder cases, both are still valid and we are duty-bound to comply with the Supreme Court's directives in each.

Instruction 731 avoids choosing the exact terms of either the *Vasquez* formulation (killing must be committed in **furtherance of their common purpose** to rob) or the *Martin/Perry* formulation (killing must be committed while the accomplice and killer are **jointly engaged** in the robbery). Accomplice liability is established whenever the killing is done during a robbery in which perpetrator and accomplice were participating. (See *People v. Cabalero* (1939) 31 Cal.App.2d 52, 61.) The accomplice participates by aiding and abetting the underlying felony before or during the commission of the felony.

Although Instruction 731 uses “aider and abettor,” note that *Pulido* does not distinguish between aiders and abettors and conspirators for purposes of complicity to homicide:

For purposes of complicity in a cofelon’s homicidal act, “[t]he conspirator and the abettor stand in the same position.” [Citation.] In stating the rule of felony-murder complicity we have not distinguished accomplices whose responsibility for the underlying felony was pursuant to prior agreement

(conspirators) from those who intentionally assisted without such agreement (aiders and abettors).

Killing by Perpetrator

The killing must be done by a co-perpetrator, as stated in *People v. Anderson* (1991) 233 Cal.App.3d 1646, 1659, fn. 9:

[Appellants] suggest the asserted illogical and sometimes inequitable results of the felony-murder doctrine *require* us to limit its application only to those homicides which are the natural, reasonable, or probable consequence of the acts of an aider and abettor. [FN9] We reject this argument.

FN9 For instance, one appellant postulates that, if a plane had crashed into the victims' house during the robbery and killed them, appellants might under some Draconian application of the felony-murder doctrine be guilty of first degree murder-since the victims were accidentally killed during the commission of a felony-even though appellants' actions might not have increased the risk of harm to which the victims were subject. Clearly no such questions are raised by the facts of appellants' case. Here, the killings were very clearly causally related to the robbery. Appellants' hypothetical argument is particularly inapposite because conviction of felony murder is limited to all persons who either directly commit robbery as the predicate crime or who, with the requisite knowledge and intent, "aid ... its commission" when "a human being is killed by *any one of several persons engaged in the perpetration of*, or attempt to perpetrate, the crime of robbery [. . .]" (CALJIC No. 8.27 (1984 rev.) as given here, italics added.) [. . .]

734. Second Degree Felony Murder: Aiding and Abetting

1 <IF THE PEOPLE'S THEORY IS THAT THE DEFENDANT WAS ALSO A
2 DIRECT PERPETRATOR, INSERT THE ELEMENTS FROM INSTRUCTION 731,
3 FELONY MURDER: SECOND DEGREE.>

4
5 **The defendant is [also] guilty of second degree murder as a felony murder if**
6 **(he/she) aided and abetted another person, whom I will call the *perpetrator*, in**
7 **the commission [or attempted commission] of _____** *<insert inherently*
8 *dangerous felony>* **and if during the commission of that crime _____**
9 *<insert name or description of decedent>* **was (killed/fatally injured). To**
10 **convict the defendant as an aider and abettor, the People must prove that:**

- 11
12 **1. The perpetrator committed [or attempted to commit] _____**
13 *<insert inherently dangerous felony>.*
- 14
15 **2. The defendant knew that the perpetrator intended to commit**
16 **_____** *<insert inherently dangerous felony>.*
- 17
18 **3. The defendant did or said something that did in fact aid and abet**
19 **the perpetrator's commission [or attempted commission] of**
20 **_____** *<insert inherently dangerous felony>.*
- 21
22 **4. When the defendant acted, (he/she) intended to aid and abet the**
23 **perpetrator's commission of _____** *<insert inherently*
24 *dangerous felony>.*

25
26 **AND**

- 27
28 **5. _____** *<insert name or description of decedent>* **was killed**
29 **during the commission [or attempted commission] of the**
30 **_____** *<insert inherently dangerous felony>.*

31
32 **A person may be guilty of felony murder even if the killing was unintentional,**
33 **accidental, or negligent.**

34
35 **Someone *aids and abets* a crime if, before or during the commission of the**
36 **crime, he or she intentionally aids, facilitates, promotes, encourages, or**
37 **instigates the perpetrator's commission of that crime.**

39 If the People have proved each of the five elements I have just listed, the
40 defendant does not need to have been actually present when the crime was
41 committed [or attempted to be committed] to be guilty as an aider and
42 abettor.

43
44 [The perpetrator committed [or attempted to commit] _____ *<insert*
45 *underlying felony>* if (he/she):

46
47 *<INSERT ELEMENTS OF UNDERLYING FELONY,*
48 *SUBSTITUTING “PERPETRATOR” FOR “DEFENDANT”>.*
49

50 [A killing occurs during the commission or attempted commission of
51 _____ *<insert inherently dangerous felony>* even if the victim does not die
52 immediately, so long as the fatal injury is inflicted during the commission of
53 that crime.]

54
55 [The person killed does not need to have been the (victim/intended victim) of
56 the underlying felony.]

57
58 [The fact that a person is present at the scene of a crime or fails to prevent the
59 crime does not by itself make him or her an aider and abettor. If you
60 conclude that the defendant was present at the scene of the crime or failed to
61 prevent the crime, you may consider that fact in determining whether the
62 defendant was an aider and abettor. However, the mere presence at the scene
63 of the crime or failure to prevent the crime does not by itself constitute aiding
64 and abetting.]

65
66 [A person who aids and abets a crime is not guilty of that crime if he or she
67 withdraws before the crime is committed. To withdraw, a person must do two
68 things:

- 69
70 1. He or she must notify everyone else who he or she knows is involved
71 in the commission of the crime that he or she is no longer
72 participating. The notification must be made early enough to
73 prevent the commission of the crime.

74
75 AND

- 76
77 2. He or she must do everything reasonably within his or her power to
78 prevent the crime from being committed. However, he or she does
79 not have to actually prevent the crime.

81 **The People have the burden of proving beyond a reasonable doubt that the**
82 **defendant did not withdraw. If the People have not met this burden, you must**
83 **find the defendant not guilty of aiding and abetting felony murder.]**

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on aiding and abetting when the prosecution relies on this theory of culpability. (See *People v. Beeman* (1984) 35 Cal.3d 547, 560–561.)

Related Instructions

Instruction 500, Aiding and Abetting: General Principles.

Instruction 731, Felony Murder: Second Degree.

Instruction 733, First Degree Felony Murder: Aiding and Abetting.

Felony murder requires that the killing and felony occur as parts of a continuous transaction. (*People v. Whitehorn* (1963) 60 Cal.2d 256, 264 [rape case].) Give the appropriate portion of Instruction 738, Felony Murder: During Commission of Felony—Defined, with this instruction.

AUTHORITY

Continuous Transaction Requirement ▶ *People v. Whitehorn* (1963) 60 Cal.2d 256, 264; *People v. Hernandez* (1988) 47 Cal.3d 315, 348.

Defendant Must Join Felonious Enterprise Before or During Killing of Victim ▶ *People v. Pulido* (1997) 15 Cal.4th 713, 726.

Infliction of Fatal Injury ▶ *People v. Alvarez* (1996) 14 Cal.4th 155, 222–223.

Inherently Dangerous Felonies ▶ *People v. Satchell* (1971) 6 Cal.3d 28, 33–41 [overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 484]; *People v. Henderson* (1977) 19 Cal.3d 86, 93 [overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 484]; *People v. Patterson* (1989) 49 Cal.3d 615, 622–625.

Intent ▶ *People v. Sears* (1965) 62 Cal.2d 737, 745 [overruled on other grounds in *People v. Cahill* (1993) 5 Cal.4th 478, 509, fn. 17]; *People v. Esquivel* (1994) 28 Cal.App.4th 1386, 1396.

Shared Specific Intent ▶ *People v. Beeman* (1984) 35 Cal.3d 547, 560.

1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Introduction to Crimes, § 80, p. 128; § 87, p. 138; Crimes Against the Person, § 156, p. 770.

STAFF NOTES

This instruction is a hybrid of the second degree felony murder and aiding and abetting instructions, which are the source of all its language, with the exception of paragraph 3, which comes from *People v. Beeman* (1984) 35 Cal.3d 547, 560:

[A]n aider and abettor will ‘share’ the perpetrator’s specific intent when he or she knows the full extent of the perpetrator’s criminal purpose and gives aid or encouragement with the intent or purpose of facilitating the perpetrator’s commission of the crime.

See Staff Notes to Instruction 733, First Degree Felony Murder: Aiding and Abetting. See also Instruction 731, Felony Murder: Second Degree, and Instruction 502, Aiding and Abetting: Intended Crimes.

735. First Degree Felony Murder: Pursuant to Conspiracy

1 **The defendant is charged [in Count ____] with first degree murder. Under the**
2 **law of felony murder, the defendant is guilty of first degree murder if (he/she)**
3 **conspired with another person [or persons] to commit _____** *<insert*
4 *felony from Pen. Code, § 189>*, **and _____** *<insert name or description of*
5 *decedent>* **was killed while a member of the conspiracy was committing [or**
6 **attempting to commit] that _____** *<insert felony from Pen. Code, § 189>*.
7

8 **To prove that the defendant is guilty of first degree felony murder, the People**
9 **must prove that:**

- 10
- 11 **1. The defendant and _____** *<insert name or description of alleged*
12 *coconspirator>* **intended to agree and did agree to commit**
13 **_____** *<insert felony from Pen. Code, § 189>*.
14
- 15 **2. At the time of the agreement, the defendant and _____** *<insert*
16 *name or description of alleged coconspirator>* **intended to commit**
17 **_____** *<insert felony from Pen. Code, § 189>*.
18
- 19 **3. Before [or at the time of] the killing, (the defendant/ [and/or]**
20 **_____** *<insert name or description of alleged coconspirator>*
21 **[or] another member of the conspiracy) committed [at least one of]**
22 **the overt act[s] alleged in the (information/indictment) in order to**
23 **commit _____** *<insert felony from Pen. Code, § 189>*.
24
- 25 **4. At least one of these overt acts was committed in California.**
26
- 27 **5. _____** *<insert name or description of alleged coconspirator>*
28 **committed [or attempted to commit] _____** *<insert felony from*
29 *Pen. Code, § 189>*.
30
- 31 **6. _____** *<insert name or description of decedent>* **was killed**
32 **during the commission [or attempted commission] of that**
33 **_____** *<insert felony from Pen. Code, § 189>*.
34

35 **AND**

- 36
- 37 **7. The killing occurred when a member of the conspiracy was acting**
38 **to further the common plan to commit _____** *<insert felony*
39 *from Pen. Code, § 189>* **or the killing was a natural and probable**

consequence of the plan to commit _____ <insert felony from
Pen. Code, § 189>.

A natural and probable consequence is one that a reasonable and prudent person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all of the circumstances established by the evidence.

A person may be guilty of felony murder even if the killing was unintentional, accidental, or negligent.

_____ <insert name or description of alleged coconspirator> **committed [or attempted to commit] _____ <insert felony from Pen. Code, § 189> if (he/she):**

<INSERT ELEMENTS OF UNDERLYING FELONY, SUBSTITUTING NAME OR DESCRIPTION OF ALLEGED COCONSPIRATOR FOR “DEFENDANT.”>

The People do not need to prove that the (the defendant[s]/ [and/or] _____ <insert name or description of alleged coconspirator>) actually met or came to a detailed, formal agreement to commit _____ <insert crime[s] or other unlawful act[s]>. The People must prove, however, that (the defendant[s]/ [and/or] _____ <insert name or description of alleged coconspirator>) had a mutual understanding and intent to commit (that/those) crime[s].

An overt act is an act by one or more of the members of the conspiracy that is done to help accomplish the goal of the conspiracy. The overt act must happen after the defendant(s) (has/have) agreed to commit the crime. The overt act must be more than the act of agreeing or planning to commit the crime, but the overt act need not be a criminal act.

[The defendant must have formed the intent to commit _____ <insert felony> before the killing took place.]

[A killing occurs during the commission [or attempted commission] of _____ <insert felony> even if the victim does not die immediately, so long as the fatal injury is inflicted during the commission of the crime.]

[The person killed does not need to have been the (victim/intended victim) of the underlying felony.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on conspiracy when the prosecution relies on this theory of culpability. (See *People v. Beeman* (1984) 35 Cal.3d 547, 560–561 [in context of aiding and abetting].)

The felonies that support a charge of first degree felony murder are arson, rape, carjacking, robbery, burglary, kidnapping, mayhem, train wrecking, sodomy, oral copulation, sexual penetration, and lewd or lascivious acts on a child. (See Pen. Code, § 189; *People v. Baker* (1999) 74 Cal.App.4th 243, 248–250.)

Related Instructions

Instruction 550, Conspiracy.

Instruction 555, Withdrawal From Conspiracy.

Instruction 743, Conspiracy to Commit Murder.

Instruction 730, Felony Murder: First Degree.

Instruction 736, Second Degree Felony Murder: Pursuant to Conspiracy.

Felony murder requires that the killing and felony occur as parts of a continuous transaction. (*People v. Whitehorn* (1963) 60 Cal.2d 256, 264 [rape case].) Give the appropriate portion of Instruction 738, Felony Murder: During the Commission of Felony—Defined, with this instruction.

AUTHORITY

Felony Murder ▶ Pen. Code, § 189.

Elements of Conspiracy ▶ Pen. Code, §§ 182(a), 183; *People v. Morante* (1999) 20 Cal.4th 403, 416; *People v. Swain* (1996) 12 Cal.4th 593, 600; *People v. Liu* (1996) 46 Cal.App.4th 1119, 1128.

Death of Coconspirator ▶ *People v. Cabalero* (1939) 31 Cal.App.2d 52, 57–58.

Defendant Must Join Felonious Enterprise Before or During Killing of Victim ▶ *People v. Pulido* (1997) 15 Cal.4th 713, 726.

Act in Furtherance of Felony ▶ *People v. Billa* (2003) 31 Cal.4th 1064, 1071.

Elements of Underlying Offense ▶ *People v. Fenenbock* (1996) 46 Cal.App.4th 1688, 1706; *People v. Cortez* (1998) 18 Cal.4th 1223, 1238–1239.

Overt Act Defined ▶ Pen. Code, § 184; *People v. Saugstad* (1962) 203 Cal.App.2d 536, 549–550; *People v. Zamora* (1976) 18 Cal.3d 538, 549, fn. 8.

Two Specific Intent ▶ *People v. Miller* (1996) 46 Cal.App.4th 412, 423–426.

1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Elements, §§ 68–97, pp. 277–314.

RELATED ISSUES

Merger

Under the merger doctrine stated in *People v. Ireland* (1969) 70 Cal.2d 522, 538, felony murder may not be based on an underlying felony assault conspiracy. (*People v. Baker* (1999) 74 Cal.App.4th 243, 248, 250–251.)

STAFF NOTES

This instruction is a hybrid of the first degree felony murder and conspiracy instructions.

Natural and Probable Consequences

Although it is unclear, it appears the “natural and probable consequences doctrine” continues to limit liability under felony murder pursuant to conspiracy. In the context of felony murder *aiding and abetting*, the killing *does not* have to be “probable” under the felony murder rule, as discussed in *People v. Anderson* (1991) 233 Cal.App.3d 1646, 1658:

[I]n this case it was charged that the killings took place in the course of another independent felony, robbery; and therefore, appellants, who aided and abetted the robbery, could potentially be liable for murder committed in the course of that robbery, even though the killings were *not* natural, reasonable, or probable consequences of the robbery. [Citation omitted.] The felony-murder rule is not in fact limited to killings which seem “probable”; it includes “a variety of unintended homicides resulting from reckless behavior, or ordinary negligence, or pure accident; it embraces both calculated conduct and acts committed in panic or rage, or under the dominion of mental illness, drugs, or alcohol; and *it condemns alike consequences that are highly probable, conceivably possible, or wholly unforeseeable.*”

However, the court specifically distinguished felony murder aiding and abetting from felony murder pursuant to conspiracy. *Anderson* held that the trial court properly refused to “engraft into instructions on aiding and abetting and felony murder [. . .] those limiting concepts of conspiracy law [. . .].” (*Id.* at p. 1657.) In explaining those “limiting concepts, the court quoted the defense requested instruction, CALJIC No. 8.26, Felony Murder in Pursuance of Conspiracy, which states that coconspirators are only liable for an act of a principal which is “in furtherance of a common design and agreement to commit [. . . a felony] or is an ordinary and probable result of the pursuit of that design and agreement [. . .].” (*Id.* at p. 1654 [quoting CALJIC No. 8.26].)

People v. Sutton (1936) 17 Cal.App.2d 561, 567–568, discusses the “natural and probable consequence of the unlawful enterprise”:

[W]here two or more persons conspire to commit any one of the felonies designated in [Penal Code] section 189, and in furtherance of the common purpose a homicide is committed by one of the confederates, all persons so engaged in the criminal enterprise, whether or not they actually do the

killing, are as accountable to the law as though their hands had intentionally given the fatal blow or fired the fatal shot; and under such circumstances the jury has no option but to render a verdict of murder in the first degree whether the killing was intentional or accidental. [. . .] [T]he moment [the defendant] entered into the criminal enterprise the law fastened on him the intent which made any killing in the perpetration of the burglary or immediately connected therewith, or which resulted therefrom as a natural and probable consequence of the unlawful enterprise, murder of the first degree.

(See also *People v. Perry* (1925) 195 Cal. 623, 637–638; *People v. Di Donato* (1928) 90 Cal.App. 366, 373 [jury question whether act committed was ordinary and probable effect of the common design]; *People v. Martin* (1983) 150 Cal.App.3d 148, 163–64 [holding sufficient evidence to support felony murder where evidence showed killing was committed both in furtherance of and as natural and probable consequence of conspiracy to commit extortion]; *People v. Escobar* (1996) 48 Cal.App.4th 999, 1019–20 [when charge is felony murder by aiding and abetting, “[t]here is no requirement, as there is in conspiracy law, that the actions which resulted in the killing were in furtherance of the conspiracy”].)

The court in *People v. Harper* (1945) 25 Cal.2d 862, 871, held that a murder committed by a confederate can be a natural and probable consequence of a robbery:

The fact is indisputable [. . .] that the killing was in furtherance of the common design, even if we limit the common design to robbery and avoidance of detection. To avoid detection much more necessary and important than wearing gloves or removing fingerprints from the car was the killing of the victim. [. . .] “[I]f several parties conspire or combine together to commit any unlawful act, each is criminally responsible for the acts of his associates or confederates committed in furtherance of any prosecution of the common design for which they combine.” [. . .] “Each [conspirator] is responsible for everything done by his confederates, which follows incidentally in the execution of the common design as one of its probable and natural consequences, even though it was not intended as a part of the original design or common plan.”

An attempt to escape may be part of the continuous transaction of the felony that resulted in the killing of another, as discussed in *People v. Ellengerger* (1958) 165 Cal.App.2d 495, 499–500:

[T]he killing was committed in connection with conduct intended to facilitate escape after the robbery and as part of one continuous transaction;

accordingly, it constituted murder of the first degree by the terms of the statute.

ON REVIEW: #02-82 *People v. Cavitt*, S105058. (A081492, A088117; unpublished opinion.) Review on the following issues:

(1) Is an accomplice liable for first degree murder under the felony-murder rule whenever a killing is committed while the accomplice and the actual killer are jointly engaged in a felony implicating the felony-murder rule, or is an accomplice liable only where the killing is committed in furtherance of a common purpose or design to commit the underlying felony? (See *People v. Pulido* (1997) 15 Cal.4th 713, 721-722 & fn. 2.)

(2) Does the principle terminating liability under the felony-murder rule when the perpetrators of the underlying felony have attained a place of temporary safety apply where only some perpetrators have reached such a place and the killing is thereafter committed by a perpetrator who has not reached a place of temporary safety?

(3) Did the trial court prejudicially err in precluding defendants from presenting evidence establishing that a cohort harbored independent animus for purposes of first-degree felony murder?

In the recent case of *People v. Billa* (2003) 31 Cal.4th 1064, 1071, fn. 5, the court noted:

In *People v. Pulido*, *supra*, 15 Cal.4th at pages 721-722, we identified two somewhat different lines of authority regarding the exact scope of accomplice liability [for felony murder]. As in *Pulido*, we need not reconcile or choose between these lines because the result here would be the same under either.

736. Second Degree Felony Murder: Pursuant to Conspiracy

1 **The defendant is charged [in Count __] with second degree murder. Under**
2 **the law of felony murder, the defendant is guilty of second degree murder if**
3 **(he/she) conspired with another person [or persons] to commit _____**
4 **<insert inherently dangerous felony>, and _____<insert name or**
5 **description of decedent> was killed while a member of the conspiracy was**
6 **committing [or attempting to commit] _____ <insert inherently**
7 **dangerous felony>.**

8
9 **To prove that the defendant is guilty of second felony degree murder, the**
10 **People must prove that:**

- 11
12 **1. The defendant and _____<insert name or description of alleged**
13 **coconspirator> intended to agree and did agree to commit**
14 **_____ <insert inherently dangerous felony>.**
- 15
16 **2. At the time of the agreement, the defendant and _____ <insert**
17 **name or description of alleged coconspirator> intended to commit**
18 **_____ <insert inherently dangerous felony>.**
- 19
20 **3. Before [or at the time of] the killing, (the defendant/ [and/or]**
21 **_____ <insert name or description of alleged coconspirator>**
22 **[or] another member of the conspiracy) committed [at least one of]**
23 **the overt act[s] alleged in the (information/indictment) in order to**
24 **commit _____ <insert inherently dangerous felony>.**
- 25
26 **4. At least one of these overt acts was committed in California.**
- 27
28 **5. _____ <insert name or description of alleged coconspirator>**
29 **committed [or attempted to commit] _____ <insert inherently**
30 **dangerous felony>.**
- 31
32 **6. _____ <insert name or description of decedent> was killed**
33 **during the commission [or attempted commission] of _____**
34 **<insert inherently dangerous felony>.**

35
36 **AND**

- 37
38 **7. The killing occurred when a member of the conspiracy was acting**
39 **to further the common plan to commit _____ <insert**

40 *inherently dangerous felony*> or the killing was a natural and
41 **probable consequence of the plan to commit** _____ <insert
42 *inherently dangerous felony*>.

43
44 **A natural and probable consequence** is one that a reasonable and prudent
45 person would know is likely to happen if nothing unusual intervenes. In
46 deciding whether a consequence is natural and probable, consider all of the
47 circumstances established by the evidence.

48
49 **A person may be guilty of felony murder even if the killing was unintentional,**
50 **accidental, or negligent.**

51
52 _____ <insert name or description of alleged coconspirator> **committed**
53 **[or attempted to commit]** _____ <insert name of inherently dangerous
54 *felony*> **if (he/she):**

55
56 *<INSERT ELEMENTS OF UNDERLYING FELONY, SUBSTITUTING*
57 *NAME OR DESCRIPTION OF ALLEGED COCONSPIRATOR FOR*
58 *“DEFENDANT.”>*

59
60 **The People do not need to prove that the (the defendant[s]/ [and/or]**
61 _____ <insert name or description of alleged coconspirator>) **actually met**
62 **or came to a detailed, formal agreement to commit** _____ <insert
63 *crime[s] or other unlawful act[s]>. **The People must prove, however, that (the**
64 **defendant[s]/ [and/or]** _____ <insert name or description of alleged
65 *coconspirator*>) **had a mutual understanding and intent to commit**
66 **(that/those) crime[s].***

67
68 **An overt act** is an act by one or more of the members of the conspiracy that is
69 done to help accomplish the goal of the conspiracy. The overt act must
70 happen after the defendant(s) (has/have) agreed to commit the crime. The
71 overt act must be more than the act of agreeing or planning to commit the
72 crime, but the overt act need not be a criminal act.

73
74 **[The defendant must have formed the intent to commit** _____ <insert
75 *inherently dangerous felony*> **before the killing took place.]**

76
77 **[A killing occurs during the commission [or attempted commission] of**
78 _____ <insert *felony*> **even if the victim does not die immediately, so**
79 **long as the injury that caused the death is inflicted during the commission of**
80 **the crime.]**

82 [The person killed does not need to have been the (victim/intended victim) of
83 the underlying felony.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on conspiracy when the prosecution relies on this theory of culpability. (See *People v. Beeman* (1984) 35 Cal.3d 547, 560–561 [in context of aiding and abetting].)

Whether a felony is inherently dangerous is a legal question. (*People v. Satchell* (1971) 6 Cal.3d 28, 36.) For a list of felonies found to be inherently dangerous, see the Related Issues section of Instruction 731, Felony Murder: Second Degree.

Related Instructions

Instruction 550, Conspiracy.

Instruction 555, Withdrawal From Conspiracy.

Instruction 743, Conspiracy to Commit Murder.

Instruction 731, Felony Murder: Second Degree.

Instruction 735, First Degree Felony Murder: Pursuant to Conspiracy.

Felony murder requires that the killing and felony occur as parts of a continuous transaction. (*People v. Whitehorn* (1963) 60 Cal.2d 256, 264 [rape case].) Give the appropriate portion of Instruction 738, Felony Murder: During Commission of Felony—Defined, with this instruction.

AUTHORITY

Elements of Conspiracy ▶ Pen. Code, §§ 182(a), 183; *People v. Morante* (1999) 20 Cal.4th 403, 416; *People v. Swain* (1996) 12 Cal.4th 593, 600; *People v. Liu* (1996) 46 Cal.App.4th 1119, 1128.

Death of Coconspirator ▶ *People v. Cabalero* (1939) 31 Cal.App.2d 52, 57–58.

Defendant Must Join Felonious Enterprise Before or During Killing of

Victim ▶ *People v. Pulido* (1997) 15 Cal.4th 713, 726.

Act in Furtherance of Felony ▶ *People v. Billa* (2003) 31 Cal.4th 1064, 1071.

Elements of Underlying Offense ▶ *People v. Fenenbock* (1996) 46 Cal.App.4th 1688, 1706; *People v. Cortez* (1998) 18 Cal.4th 1223, 1238–1239.

Overt Act Defined ▶ Pen. Code, § 184; *People v. Saugstad* (1962) 203 Cal.App.2d 536, 549–550; *People v. Zamora* (1976) 18 Cal.3d 538, 549, fn. 8.

Second Degree Felony Murder ▶ *People v. Williams* (1965) 63 Cal.2d 452, 457.

Two Specific Intent ▶ *People v. Miller* (1996) 46 Cal.App.4th 412, 423–426.

1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Elements, §§ 68–97, pp. 277–314.

RELATED ISSUES

Merger

Under the merger doctrine stated in *People v. Ireland* (1969) 70 Cal.2d 522, 538, felony murder may not be based on an underlying felony assault conspiracy. (*People v. Baker* (1999) 74 Cal.App.4th 243, 248, 250–251.)

STAFF NOTES

This instruction is a hybrid of the second degree felony murder and conspiracy instructions. See Notes to First Degree Felony Murder: Conspiracy.

The second degree felony murder was described in *People v. Williams* (1965) 63 Cal.2d 452, 457:

This court has expressed the nature and extent of the felony-second-degree-murder rule in *People v. Ford* (1964) 60 Cal.2d 772, 795 [. . .]: “A homicide that is a direct causal result of the commission of a felony inherently dangerous to human life (other than the six felonies enumerated in Pen. Code, § 189) constitutes at least second degree murder.”

737. Malice Versus Felony Murder

1 **The defendant has been tried for murder under two theories: (1) that the**
2 **killing was committed with malice aforethought, and (2) that a person was**
3 **killed during the commission of _____ <insert felony>.**

4
5 **Each theory of murder has different requirements, and I have instructed you**
6 **on both.**

7
8 **You may not convict the defendant of murder unless all of you agree that the**
9 **People have proved that the defendant committed murder. But all of you do**
10 **not need to agree on the same theory.**

BENCH NOTES

Instructional Duty

This instruction is designed to be given when murder is charged on theories of malice and felony murder to help the jury distinguish between the two theories.

738. Felony Murder: During Commission of Felony—Defined

1 **A killing occurs *during [or while engaged in] the commission of* _____**
2 ***<insert felony>* if the killing and the crime are part of one continuous**
3 **transaction. The continuous transaction may occur over a period of time and**
4 **in more than one location.**

5
6 **The People must prove beyond a reasonable doubt that the killing occurred**
7 **during the commission of _____ *<insert felony>*. If the People have not**
8 **met this burden, you must find the defendant[s] not guilty [under a felony**
9 **murder theory].**

10
11 *<Insert one or more bracketed paragraphs below depending on crime(s)*
12 *alleged.>*

13
14 *<Robbery>*

15 **[A killing occurs during the commission of robbery [or attempted robbery] if**
16 **a person is killed while a perpetrator is (taking/ [or] attempting to take)**
17 **property by force or fear, immediately after a perpetrator has (taken/ [or]**
18 **attempted to take) property by force or fear[,] [or] while the perpetrator[s]**
19 **(is/are) fleeing from the scene[, or while someone is pursuing the**
20 **perpetrator[s], trying to catch (him/her/them) or to take back the property].]**
21 **[A killing also occurs during the commission of robbery [or attempted**
22 **robbery] if it occurs while the safety of the perpetrator[s] is at risk because**
23 **(he/she/they) continue[s] to physically control the person who is the target of**
24 **the robbery.]**

25
26 **A killing does not occur during the commission of robbery [or attempted**
27 **robbery] if the perpetrator[s] (has/have) actually reached a temporary place**
28 **of safety before the killing happens.**

29
30 **The perpetrator[s] (has/have) reached a temporary place of safety if:**

31
32 **(He/She/They) (has/have) successfully escaped from the scene;**

33
34 **[(He/She/They) (is/are) no longer being pursued;]**

35
36 **[AND]**

37
38 **[(He/She/They) (has/have) unchallenged possession of the property;]**

[AND

(He/She/They) (is/are) not continuing to physically control the person who is the target of the robbery].]

<Burglary>

[A killing occurs during the commission of burglary [or attempted burglary] if a person is killed while a perpetrator of burglary is entering [or attempting to enter] the (building/_____ *<insert other description of location>*), after a perpetrator enters [or attempts to enter] the (building/_____ *<insert other description of location>*), [or] while the perpetrator[s] (is/are) fleeing from the scene[, or while someone is pursuing the perpetrator[s], trying to catch (him/her/them) [or trying to take back the property]].

A killing does not occur during the commission of burglary [or attempted burglary] if the perpetrator[s] (has/have) actually reached a temporary place of safety before the killing happens. The perpetrator[s] (has/have) reached a temporary place of safety if (he/she/they) (has/have) successfully escaped from the scene[, and] (is/are) no longer being pursued[, and (has/have) unchallenged possession of the property].]

<Sexual Assault>

[A killing occurs during the commission [or attempted commission] of _____ *<insert sexual assault alleged>* if a person is killed during or immediately after the _____ *<insert sexual assault alleged>* [or attempted _____ *<insert sexual assault alleged>*], [or] while the perpetrator[s] (is/are) fleeing from the scene[, or while someone is pursuing the perpetrator[s], trying to catch (him/her/them)]. [A killing also occurs during the commission of _____ *<insert sexual assault alleged>* if both the killing and the _____ *<insert sexual assault alleged>* occur during a period in which the perpetrator[s] (has/have) continuous physical control over the person who is the target of the crime.]

A killing does not occur during the commission of _____ *<insert sexual assault alleged>* if the perpetrator[s] (has/have) actually reached a temporary place of safety before the killing happens. The perpetrator[s] (has/have) reached a temporary place of safety if (he/she/they) (has/have) successfully escaped from the scene, (is/are) no longer being pursued, and (is/are) no longer in physical control of the person who was the target of the crime.]

81 <Kidnapping>

82 [A killing occurs during the commission [or attempted commission] of
83 kidnapping if a person is killed while the perpetrator[s] (has/have) physical
84 control over the kidnapped person, while the perpetrator[s] (is/are)
85 attempting to gain control over the kidnapped person, or while the
86 perpetrator[s] (is/are) fleeing from the scene. A killing also occurs during the
87 commission of kidnapping if a person is killed while the perpetrator[s]
88 (has/have) continuous physical control over the kidnapped person.

90 A killing does not occur during the commission [or attempted commission] of
91 kidnapping if the perpetrator[s] (has/have) actually reached a temporary
92 place of safety before the killing happens. The perpetrator[s] (has/have)
93 reached a temporary place of safety if (he/she/they) (has/have) successfully
94 escaped from the scene, (is/are) no longer being pursued, and (is/are) no
95 longer in continuous physical control of the person kidnapped.]

97 <Other Felony>

98 [A killing occurs during the commission [or attempted commission] of
99 _____ <insert felony alleged> if a person is killed during or immediately
100 after the _____ <insert felony alleged> or while the perpetrator[s]
101 (is/are) fleeing from the scene.

102
103 A killing does not occur during the commission of _____ <insert felony
104 alleged> if the perpetrator[s] (has/have) actually reached a temporary place
105 of safety before the killing happens. The perpetrator[s] (has/have) reached a
106 temporary place of safety if (he/she/they) (has/have) successfully escaped
107 from the scene and (is/are) no longer being pursued.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on the duration of the felony if the prosecution is pursuing a felony murder theory. (See *People v. Fields* (1983) 35 Cal.3d 329, 363–364; *People v. Pearch* (1991) 229 Cal.App.3d 1282, 1299.) This instruction must be given *with* one of the felony murder instructions explaining the elements of the offense.

Use the bracketed phrase “while engaged in” only if this instruction is being given with Instruction 731SC, Special Circumstances: Murder in Commission of Felony, § 190.2(a)(17). (See *People v. Guzman* (1988) 45 Cal.3d 915, 950.)

AUTHORITY

- Continuous Transaction ▶ *People v. Whitehorn* (1963) 60 Cal.2d 256, 264; *People v. Hart* (1999) 20 Cal.4th 546, 608–609; *People v. Ainsworth* (1988) 45 Cal.3d 984, 1016; *People v. Hernandez* (1988) 47 Cal.3d 315, 346.
- Continuous Control of Victim ▶ *People v. Thompson* (1990) 50 Cal.3d 134, 171–172 [lewd acts]; *People v. Carter* (1993) 19 Cal.App.4th 1236, 1251–1252 [robbery].
- Temporary Place of Safety ▶ *People v. Salas* (1972) 7 Cal.3d 812, 823; *People v. Johnson* (1992) 5 Cal.App.4th 552, 560.
- Burglary ▶ *People v. Bodely* (1995) 32 Cal.App.4th 311, 313–314.
- Kidnapping ▶ *People v. Pearch* (1991) 229 Cal.App.3d 1282, 1299; *People v. Silva* (1988) 45 Cal.3d 604, 632.
- Lewd Acts on Child ▶ *People v. Thompson* (1990) 50 Cal.3d 134, 171–172.
- Robbery ▶ *People v. Salas* (1972) 7 Cal.3d 812, 823; *People v. Cooper* (1991) 53 Cal.3d 158, 1170.
- Sexual Assault ▶ *People v. Hart* (1999) 20 Cal.4th 546, 611; *People v. Hernandez* (1988) 47 Cal.3d 315, 348.

1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against the Person, §§ 139–142.

RELATED ISSUES

Temporary Place of Safety Based on Objective Standard

Whether the defendant had reached a temporary place of safety is judged on an objective standard. The “issue to be resolved is whether a robber had actually reached a place of temporary safety, not whether the defendant thought that he or she had reached such a location.” (*People v. Johnson* (1992) 5 Cal.App.4th 552, 560.)

STAFF NOTES

Continuous Transaction

There is no requirement that the killing occur, "while committing" or "while engaged in" the felony, or that the killing be "a part of" the felony, other than that the few acts be a part of one continuous transaction. Thus the homicide need not have been committed "to perpetrate" the felony. There need be no technical inquiry as to whether there has been a completion or abandonment of or desistance from the robbery before the homicide itself was completed.

(*People v. Stamp* (1969) 2 Cal.App.3d 203, 210 [citations omitted].)

There is no requirement of a strict 'causal' or 'temporal' relationship between the 'felony' and the 'murder.' All that is demanded is that the two 'are parts of one continuous transaction.' There is, however, a requirement of proof beyond a reasonable doubt of the underlying felony.

(*People v. Hart* (1999) 20 Cal.4th 546, 608-609.)

Continuous Control of Victim

In *People v. Fields* (1983) 35 Cal.3d 329, 367-68, the defendant robbed the victim, then drove her some distance from his home to kill her. We found a felony murder, noting that the crimes were linked not only by defendant's motive -- which, as here, may have included preventing the victim from identifying him to the police -- but also by his "continued control over the victim." (*Id.* at p. 368.) Even if, in the present case, one or more lewd acts occurred at defendant's apartment, perhaps another (the sodomy) elsewhere and the killing some hours later in Palos Verdes, defendant's control over the victim was continuous and links the crimes.

(*People v. Thompson* (1990) 50 Cal.3d 134171-172.)

In *People v. Carter* (1993) 19 Cal.App.4th 1236, 1251-52, the court approved of this instruction: "a perpetrator of a robbery has not reached a place of temporary safety if the continued control over the victim places the perpetrator's safety in jeopardy." In *People v. Carter, supra*, 19 Cal.App.4th

at pp. 1241-43, defendants drove the victim to a secluded area before killing him and taking his wallet. The defendants were charged with robbery-felony murder, not kidnapping felony murder. Arguably, the facts might have supported the conclusion that the defendants did not abduct the victim but convinced him to accompany them to the secluded area as a “pick up.” (*Ibid.*)

Temporary Place of Safety

“[A] fleeing robber's failure to reach a place of temporary safety is alone sufficient to establish the continuity of the robbery within the felony-murder rule.” (*People v. Salas* (1972) 7 Cal.3d 812, 823.)

740. Homicide: Provocative Act by Defendant

1 [The defendant is charged [in Count __] with _____ <insert underlying
2 crime>.] The defendant is [also] charged [in Count __] with murder. A person
3 can be guilty of murder under the provocative act doctrine even if someone
4 else did the actual killing.

5
6 The defendant is guilty of murder under the provocative act doctrine if the
7 People have proved that:

8
9 1. In (committing/attempting to commit) _____ <insert
10 underlying crime>, the defendant intentionally did a provocative act.

11
12 2. The defendant knew that the natural and probable consequences of
13 the provocative act were dangerous to human life and then acted
14 with conscious disregard for life.

15
16 3. In response to the defendant's provocative act, _____ <insert
17 name or description of third party> killed _____ <insert name[s]
18 or description[s] of decedent[s]>.

19
20 **AND**

21
22 4. _____'s <insert name[s] or description[s] of decedent[s]>
23 death[s] (was/were) the natural and probable consequence[s] of the
24 defendant's provocative act.

25
26 *A provocative act is an act:*

27
28 1. [That goes beyond what is necessary to accomplish the _____
29 <insert underlying crime>.]

30
31 **[AND**

32
33 2.] Whose natural and probable consequences are dangerous to human
34 life, because there is a high probability that the act will provoke a
35 deadly response.

<Natural and Probable Consequences>

In order to prove that _____'s *<insert name[s] or description[s] of decedent[s]>* death[s] (was/were) the *natural and probable consequence[s]* of the defendant's provocative act, the People must prove that:

- 1. A reasonable and prudent person in the defendant's position would have foreseen that there was a high probability that (his/her) act could begin a chain of events resulting in someone's death.**

[AND]

- 2. The defendant's act was a direct and substantial factor in causing _____'s *<insert name[s] or description[s] of decedent[s]>* death[s].**

[AND]

- 3. _____'s *<insert name[s] or description[s] of decedent[s]>* death[s] would not have happened if the defendant had not committed the provocative act.]**

<Multiple Provocative Acts>

[You may not find the defendant guilty under the provocative act doctrine unless each of you is convinced beyond a reasonable doubt that each fact essential to the conclusion that the defendant is guilty has been proved. However, under the doctrine, if each of you is satisfied beyond a reasonable doubt that the defendant committed a provocative act as defined here, you do not all need to agree upon the same provocative act.]

<Other Issues>

A *substantial factor* is more than a trivial or remote factor. However, it does not need to be the only factor that caused _____'s *<insert name[s] or description[s] of decedent[s]>* death[s].

[A defendant is not guilty of murder if the killing of _____ *<insert name[s] or description[s] of decedent[s]>* was caused solely by the independent act[s] of someone else. An *independent criminal act* is a free, deliberate, and informed criminal act by a person who is not acting with the defendant.]

<Degree of Murder>

[If you decide that the defendant has committed murder, you must determine if the murder is first or second degree.]

79
80 **The defendant is guilty of first degree murder if the People have proved that:**

- 81
82 **1. As a result of the defendant's provocative act, _____ <insert**
83 **name[s] or description[s] of decedent[s]> (was/were) killed during**
84 **the commission of _____ <insert Pen. Code, § 189 felony>.**

85
86 **AND**

- 87
88 **2. Defendant specifically intended to commit _____ <insert Pen.**
89 **Code, § 189 felony> when (he/she) did the provocative act.**

90
91 **In deciding whether the defendant committed _____ <insert Pen. Code,**
92 **§ 189 felony>, you should refer to the instructions I have given you on**
93 **_____ <insert Pen. Code, § 189 felony>.**

94
95 **Any murder that does not meet these requirements for first degree murder is**
96 **second degree murder.]**

97
98 **[If you decide that the defendant committed murder, that crime is murder in**
99 **the second degree.]**

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction if the provocative act doctrine is one of the general principles of law relevant to the issues raised by the evidence. (*People v. Hood* (1969) 1 Cal.3d 444, 449.) If the prosecution relies on a first degree murder theory based on a Penal Code section 189 felony, the court has a **sua sponte** duty to give instructions relating to that felony, whether it is separately charged or not.

If the defendant is an accomplice, aider and abettor, or coconspirator of the person who did the provocative act, give Instruction 741, Homicide: Provocative Act by Accomplice, instead of this one.

The first bracketed sentence of this instruction should only be given if the underlying felony is separately charged.

Give the bracketed portion of the definition of provocative act if the underlying felony does not require a mental state of implied or express malice. (*In re Aurelio R.* (1985) 167 Cal.App.3d 52, 59–60.)

Give bracketed element 3 of the requirements for *natural and probable consequences* only if it is undisputed that there is potentially only one provocative act.

If there is evidence that the actual perpetrator may have committed an *independent criminal act*, give on request the bracketed paragraph under “Other Issues” that begins with “A defendant is not guilty of murder if . . .” (See *People v. Cervantes* (2001) 26 Cal.4th 860, 874.)

If the evidence suggests that there is more than one provocative act, give the bracketed paragraph beginning with “You may not find the defendant guilty,” which instructs the jury that they need not unanimously agree about which provocative act caused the killing. (*People v. Briscoe* (2001) 92 Cal.App.4th 568, 591.)

If the prosecution is not seeking a first degree murder conviction, omit those bracketed paragraphs relating to first degree murder and simply give the last bracketed paragraph of the instruction. As an alternative, you may omit all instructions relating to the degree and secure a stipulation that if a murder verdict is returned, the degree of murder is set at second degree.

In *People v. Nieto Benitez* (1992) 4 Cal.4th 91, 111, the Supreme Court held that the phrase “an act, the natural and probable consequences of which are dangerous to life,” is equivalent to the phrase “an act [committed] with a high probability that it will result in death.” The court specifically approved the “natural and probable consequences” formulation and declined to require that both formulations be used.

The general rule that has arisen in the context of robbery cases is that the provocative act must be one that goes beyond what is necessary to accomplish the underlying felony. However, more recent cases make clear that this requirement is not universal. In attempted murder or assault with a deadly weapon cases, the crime itself may be a provocative act because it demonstrates either express or implied malice. (*In re Aurelio R.* (1985) 167 Cal.App.3d 52, 59–60; see *Pizano v. Superior Court of Tulare County* (1978) 21 Cal.3d 128, 134.)

The California Supreme Court has declined to decide whether the felony-murder doctrine could constitutionally apply to the death of a fetus that did not result from a direct attack on the mother. (*People v. Davis* (1994) 7 Cal.4th 797, 810, fn. 2.) That ambiguity could extend to the provocative act doctrine as well.

AUTHORITY

- Provocative Act Doctrine ▶ *People v. Gallegos* (1997) 54 Cal.App.4th 453, 461.
- Felony-Murder Rule Invoked to Determine Degree ▶ *People v. Gilbert* (1965) 63 Cal.2d 690, 705; *Pizano v. Superior Court of Tulare County* (1978) 21 Cal.3d 128, 139, fn. 4; see *People v. Caldwell* (1984) 36 Cal.3d 210, 216–217, fn. 2.
- Independent Intervening Act by Third Person ▶ *People v. Cervantes* (2001) 26 Cal.4th 860, 874.
- Natural and Probable Consequences Doctrine ▶ *People v. Gardner* (1995) 37 Cal.App.4th 473, 479.
- Response of Third Party Need Not Be Reasonable ▶ *People v. Gardner* (1995) 37 Cal.App.4th 473, 482.
- Unanimity on Which Act Constitutes Provocative Act Is Not Required ▶ *People v. Briscoe* (2001) 92 Cal.App.4th 568, 591 [multiple provocative acts].
- 1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against the Person, §§ 147–155, pp. 760–769.

STAFF NOTES

Provocative Act Doctrine

The provocative act must have caused the victim's death, even if the act was not directed at the victim. (*People v. Roberts* (1992) 2 Cal.4th 271, 321.) In other words, the death must have been a natural and probable consequence of the provocative act. (*Ibid.*) Moreover, the provocative act must have been done with malice. (*People v. Gallegos* (1997) 54 Cal.App.4th 453, 461–62.)

Proximate Causation

The death must be foreseeable in order to be the natural and probable consequence of the provocative act. *People v. Roberts* (1992) 2 Cal.4th 271, 321–322:

The instruction incorrectly stated the law of proximate cause. A result cannot be the natural and probable cause of an act if the act was unforeseeable.

The provocative act must also be a substantial factor in causing the death, even if there are multiple causes. *People v. Caldwell* (1984) 36 Cal.3d 210, 220 (emphasis in original, citations omitted):

To be considered a *proximate* cause of [the victim's] death, the acts of the defendants must have been a “substantial factor” contributing to the result.

This is also true in murder cases involving frail victims. In *People v. Catlin* (2001) 26 Cal. 4th 81, 155, the Supreme Court opined that a son could have poisoned his elderly mother, even though the mother's ill health was a substantial factor in causing her death.

This is true even if the victim's preexisting physical condition also was a substantial factor causing death. (citation omitted) ‘So long as a victim's predisposing physical condition, regardless of its cause, is not the *only* substantial factor bringing about his death, that condition [. . .] in no way destroys the [defendant's] criminal responsibility for the death.’ (citations omitted).

Chain of Events

The language defining the natural and probable consequences doctrine is derived from *People v. Cervantes* (2001) 26 Cal.4th 860, 866:

In homicide cases, a “cause of the death of [the decedent] is an act or omission that sets in motion a chain of events that produces as a

direct, natural and probable consequence of the act or omission the death of [the decedent] and without which the death would not occur.” (citation omitted)

Independent Intervening Act

In *People v. Cervantes* (2001) 26 Cal.4th 860, the Supreme Court held that the willful and malicious murder of another gang member that was not in direct response to the defendant’s provocative act was an independent intervening act. “The free, deliberate, and informed intervention of a second person, who intends to exploit the situation created by the first, but is not acting in concert with him, is normally held to relieve the first actor of criminal responsibility.” (*Id.* at pp. 871, 874 [quoting Hart & Honore, *Causation in the Law* (2d ed. 1985) p. 326, fn. omitted]; see *People v. Armitage* (1987) 194 Cal.App.3d 405, 420–21 [defining independent intervening cause].)

The evidence was insufficient as a matter of law to support the defendant’s conviction of provocative act murder because it failed to establish the essential element of proximate causation (*Cervantes, supra*, 26 Cal.4th at p. 872):

The facts of this case are distinguishable from the classic provocative act murder case in a number of respects. Defendant was not the initial aggressor in the incident that gave rise to the provocative act. [Footnote omitted.] There was no direct evidence that [the victim]’s unidentified murderers [footnote omitted] were even present at the scene of the provocative act [. . .] Defendant himself was not present at the scene where [the victim] was fatally gunned down [. . .] [Footnote omitted.] But the critical fact that distinguishes this case from other provocative act murder cases [footnote omitted] is that here the actual murderers were not responding to defendant’s provocative act by shooting back at him or an accomplice, in the course of which someone was killed. [. . .] The willful and malicious murder of [the victim] at the hands of others was an independent intervening act on which defendant’s liability for the murder could not be based.

The Underlying Crime Alone May Fulfill The Malice Requirement

In re Aurelio (1985) 167 Cal.App.3d 52, 59–60 explains this concept at length:

[T]here are felonies and there are felonies. The requirement of an independent provocative act has grown up in the context of felonies which do not themselves inherently involve an intent to kill. For instance, the three men who robbed the Church’s Fried Chicken dinner outlet in the *Caldwell* case planned to use their guns to threaten the employees into surrendering the cash. True, they ran

some risk they might have to actually fire those weapons in order to achieve their objective, but they did not necessarily intend to shoot anyone. If all went according to plan, no one would have been hurt and they would have been a few hundred dollars richer. Good reasons exist to require these robbers to do something further before they can be held accountable for a death resulting from a third person's bullet. Without that additional intentional and provocative act, the defendants lack the necessary state of mind – an intent to kill or at least an intent to commit life-threatening acts. Moreover, by holding them responsible for murder only if they do something beyond the underlying felony we encourage felons to halt the cycle of violence before someone is killed. For instance, if the defendants in *Caldwell* had surrendered themselves and their weapons rather than seeking to resist they would not have been liable for the death of their confederate even if he somehow had been killed by the police during the chase.

In the instant case, however, the felony the appellant and his fellow gang members undertook to commit involved an intent to kill. They did not enter Cypress Hill territory to rob a chicken restaurant hoping to escape with some money but without firing a shot. Rather they drove in there for the specific purpose of shooting and possibly killing someone. Thus there is no danger we are punishing an innocent mind if we convict them for a death which resulted when their plans misfired. Beyond that, their intentional felony was itself a “provocative act,” that is, it was a crime which was likely to provoke others to shoot back and perhaps kill one of the confelons. The appellant and his fellow Avenue Gang members knew their targets – members of the Cypress Hill Gang – were armed. There was a high probability if they shot at these rival gang members the latter would shoot back. Thus the appellant and his confederates set out to commit a felony which in and of itself comprised a “provocative act.”

741. Homicide: Provocative Act by Accomplice

1 **[The defendant is charged [in Count __] with _____ <insert underlying**
2 **crime>.] The defendant is [also] charged [in Count __] with murder. A person**
3 **can be guilty of murder under the provocative act doctrine even if someone**
4 **else did the actual killing.**

5
6 **The defendant is guilty of murder under the provocative act doctrine if the**
7 **People have proved that:**

8
9 **1. The defendant was an accomplice of _____ <insert name[s] or**
10 **description[s] of alleged provocateur[s]> in (committing/attempting**
11 **to commit) _____ <insert underlying crime>.**

12
13 **2. In (committing/attempting to commit) _____ <insert**
14 **underlying crime>, _____ <insert name[s] or description[s] of**
15 **alleged provocateur[s]> intentionally did a provocative act.**

16
17 **3. _____ <insert name[s] or description[s] of alleged**
18 **provocateur[s]> knew that the natural and probable consequences**
19 **of the provocative act were dangerous to human life and then acted**
20 **with conscious disregard for life.**

21
22 **4. In response to _____'s <insert name[s] or description[s] of**
23 **alleged provocateur[s]> provocative act, _____ <insert name or**
24 **description of third party> killed _____ <insert name[s] or**
25 **description[s] of decedent[s]>.**

26
27 **AND**

28
29 **5. _____'s <insert name[s] or description[s] of decedent[s]>**
30 **death[s] (was/were) the natural and probable consequence[s] of**
31 **_____ 's <insert name[s] or description[s] of alleged**
32 **provocateur[s]> provocative act.**

33
34 **A provocative act is an act:**

35
36 **1. [That goes beyond what is necessary to accomplish the _____**
37 **<insert underlying crime>.]**

38
39 **[AND**

2.] Whose natural and probable consequences are dangerous to human life, because there is a high probability that the act will provoke a deadly response.

<Accomplice>

The defendant is an *accomplice* of _____ *<insert name[s] or description[s] of alleged provocateur[s]>* if the defendant is liable to prosecution for the identical offense that you conclude _____ *<insert name[s] or description[s] of alleged provocateur[s]>* committed. The defendant is liable to prosecution if:

1. (He/She) knew of _____'s *<insert name[s] or description[s] of alleged provocateur[s]>* criminal purpose to commit _____ *<insert underlying crime>*.

AND

2. The defendant intended to and did (commit _____ *<insert underlying crime>*/ [or intended to and did] aid, facilitate, promote, encourage, or instigate the commission of _____ *<insert underlying crime>*/ [or intended to and did] participate in a criminal conspiracy to commit _____ *<insert underlying crime>*).

[An accomplice does not need to be present when the crime is committed. On the other hand, a person is not an accomplice just because he or she is at the scene of a crime, even if he or she knows that a crime [will be committed or] is being committed and does nothing to stop it.]

<Natural and Probable Consequences>

In order to prove that _____'s *<insert name[s] or description[s] of decedent[s]>* death[s] (was/were) the *natural and probable consequence[s]* of _____'s *<insert name[s] or description[s] of alleged provocateur[s]>* provocative act, the People must prove that:

1. A reasonable and prudent person in _____'s *<insert name[s] or description[s] of alleged provocateur[s]>* position would have foreseen that there was a high probability that (his/her/their) act could begin a chain of events resulting in someone's death.

[AND]

- 81 2. _____'s <insert name[s] or description[s] of alleged
82 provocateur[s]> **act was a direct and substantial factor in causing**
83 _____ 's <insert name[s] of decedent[s]> **death[s].**
84

85 **[AND**

- 86
87 3. _____'s <insert name[s] or description[s] of decedent[s]>
88 **death[s] would not have happened if** _____ <insert name[s] or
89 description[s] of alleged provocateur[s]> **had not committed the**
90 **provocative act.]**
91

92 <Multiple Provocative Acts>

93 **[Under the provocative act doctrine, if there is evidence of more than one**
94 **provocative act, you must decide whether:**

- 95
96 1. _____ <insert name[s] or description[s] of alleged
97 provocateur[s]> **committed at least one provocative act.**
98

99 **AND**

- 100
101 2. **At least one of the provocative acts committed by** _____
102 <insert name[s] or description[s] of alleged provocateur[s]> **was a**
103 **direct and substantial factor that caused the killing.**
104

105 **You may not find the defendant guilty under the provocative act doctrine**
106 **unless each of you is convinced beyond a reasonable doubt that each fact**
107 **essential to the conclusion that the defendant is guilty has been proved.**
108 **However, under the doctrine, if each of you is satisfied beyond a reasonable**
109 **doubt that** _____ <insert name[s] or description[s] of alleged
110 provocateur[s]> **committed a provocative act, you do not all need to agree**
111 **upon the same provocative act.]**
112

113 <Other Issues>

114 **A substantial factor is more than a trivial or remote factor. However, it does**
115 **not need to be the only factor that caused** _____ 's <insert name[s] or
116 description[s] of decedent[s]> **death[s].**
117

118 **[You may not consider any provocative act that** _____ <insert name of
119 deceased accomplice> **may have committed when you decide whether the**
120 **defendant is guilty of murder.]**
121

122 **[If you decide that the only provocative act that caused** _____ 's <insert
123 name of deceased accomplice> **death was committed by** _____ <insert

name of deceased accomplice>, then the defendant is not guilty of _____'s <insert name of deceased accomplice> murder.]

[A defendant is not guilty of murder if the killing of _____ <insert name[s] or description[s] of decedent[s]> was caused solely by the independent act[s] of someone other than the defendant or _____ <insert name[s] or description[s] of all alleged accomplice[s]>. An independent criminal act is a free, deliberate, and informed criminal act by a person who is not acting with the defendant.]

<Degree of Murder>

[If you decide that the defendant has committed murder, you must determine if the murder is first or second degree.

The defendant is guilty of first degree murder if the People have proved that:

1. As a result of _____'s <insert name[s] or description[s] of alleged provocateur[s]> provocative act, _____ <insert name[s] or description[s] of decedent[s]> (was/were) killed while _____ <insert name[s] or description[s] of alleged provocateur[s]> (was/were) committing _____ <insert Pen. Code, § 189 felony>.

AND

2. _____ <insert name[s] or description[s] of alleged provocateur[s]> specifically intended to commit _____ <insert Pen. Code, § 189 felony> when (he/she/they) did the provocative act.

In deciding whether _____ <insert name[s] or description[s] of alleged provocateur[s]> committed _____ <insert Pen. Code, § 189 felony>, you should refer to the instructions I have given you on _____ <insert Pen. Code, § 189 felony>.

Any murder that does not meet these requirements for first degree murder is second degree murder.]

[If you decide that the defendant committed murder, that crime is murder in the second degree.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction if the provocative act doctrine is one of the general principles of law relevant to the issues raised by the evidence. (*People v. Hood* (1969) 1 Cal.3d 444, 449.) If the prosecution relies on a first degree murder theory based on a Penal Code section 189 felony, the court has a **sua sponte** duty to give instructions relating to that felony, whether it is separately charged or not.

The first bracketed sentence of this instruction should only be given if the underlying felony is separately charged.

Give the first bracketed portion of the definition of provocative act if the underlying felony does not require a mental state of implied or express malice. (*In re Aurelio R.* (1985) 167 Cal.App.3d 52, 59–60; see discussion of *Nieto Benitez* below.)

In the paragraph that begins with “An accomplice does not need to be present,” use the bracketed phrase “will be committed or” if appropriate under the facts of the case.

Give bracketed element 3 of the requirements for *natural and probable consequences* only if it is undisputed that there is potentially only one provocative act.

If a deceased accomplice participated in provocative acts, give the bracketed paragraph under “Other Issues” that begins with “You may not consider any provocative act” (See *People v. Garcia* (1999) 69 Cal.App.4th 1324, 1330; *People v. Superior Court (Shamis)* (1997) 58 Cal.App.4th 833, 846; *Taylor v. Superior Court* (1970) 3 Cal.3d 578, 583–584; *People v. Antick* (1975) 15 Cal.3d 79, 90.)

If the evidence suggests that a deceased accomplice’s actions were the sole cause of his or her death, give the next bracketed paragraph that begins with “If you decide that the only provocative act” (*People v. Garcia* (1999) 69 Cal.App.4th 1324, 1332.)

If there is evidence that the actual perpetrator may have committed an *independent criminal act*, give on request the next bracketed paragraph that begins with “A defendant is not guilty of murder if” (See *People v. Cervantes* (2001) 26 Cal.4th 860, 874.)

If the prosecution is not seeking a first degree murder conviction, omit those bracketed paragraphs relating to first degree murder and simply give the last bracketed paragraph of the instruction. As an alternative, you may omit all instructions relating to the degree and secure a stipulation that if a murder verdict is returned, the degree of murder is set at second degree.

In *People v. Nieto Benitez* (1992) 4 Cal.4th 91, 111, the Supreme Court held that the phrase “an act, the natural and probable consequences of which are dangerous to life,” is equivalent to the phrase “an act [committed] with a high probability that it will result in death.” The court specifically approved the “natural and probable consequences” formulation and declined to require that both formulations be used.

The general rule that has arisen in the context of robbery cases is that the provocative act must be one that goes beyond what is necessary to accomplish the underlying felony. However, more recent cases make clear that this requirement is not universal. In attempted murder or assault with a deadly weapon cases, the crime itself may be a provocative act because it demonstrates either express or implied malice. (*In re Aurelio R.* (1985) 167 Cal.App.3d 52, 59–60; see *Pizano v. Superior Court of Tulare County* (1978) 21 Cal.3d 128, 134.)

The California Supreme Court has declined to decide whether the felony-murder doctrine could constitutionally apply to the death of a fetus that did not result from a direct attack on the mother. (*People v. Davis* (1994) 7 Cal.4th 797, 810, fn. 2.) That ambiguity could extend to the provocative act doctrine as well.

AUTHORITY

Provocative Act Doctrine ▶ *People v. Gallegos* (1997) 54 Cal.App.4th 453, 461.

Felony-Murder Rule Invoked to Determine Degree ▶ *People v. Gilbert* (1965) 63 Cal.2d 690, 705; *Pizano v. Superior Court of Tulare County* (1978) 21 Cal.3d 128, 139, fn. 4; see *People v. Caldwell* (1984) 36 Cal.3d 210, 216–217, fn. 2.

Independent Intervening Act by Third Person ▶ *People v. Cervantes* (2001) 26 Cal.4th 860, 874.

Natural and Probable Consequences Doctrine ▶ *People v. Gardner* (1995) 37 Cal.App.4th 473, 479.

Response of Third Party Need Not Be Reasonable ▶ *People v. Gardner* (1995) 37 Cal.App.4th 473, 482.

Unanimity on Which Act Constitutes Provocative Act Is Not Required ▶ *People v. Briscoe* (2001) 92 Cal.App.4th 568, 591 [multiple provocative acts].

1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against the Person, §§ 147–155, pp. 760–769.

STAFF NOTES

Provocative Act Doctrine

The provocative act must have caused the victim's death, even if the act was not directed at the victim. (*People v. Roberts* (1992) 2 Cal.4th 271, 321.) In other words, the death must have been a natural and probable consequence of the provocative act. (*Ibid.*) Moreover, the provocative act must have been done with malice. (*People v. Gallegos* (1997) 54 Cal.App.4th 453, 461–62.)

Proximate Causation

The death must be foreseeable in order to be the natural and probable consequence of the provocative act. *People v. Roberts* (1992) 2 Cal.4th 271, 321–322:

The instruction incorrectly stated the law of proximate cause. A result cannot be the natural and probable cause of an act if the act was unforeseeable.

The provocative act must also be a substantial factor in causing the death, even if there are multiple causes. *People v. Caldwell* (1984) 36 Cal.3d 210, 220 (emphasis in original, citations omitted):

To be considered a *proximate* cause of [the victim's] death, the acts of the defendants must have been a “substantial factor” contributing to the result.

This is also true in murder cases involving frail victims. In *People v. Catlin* (2001) 26 Cal. 4th 81, 155, the Supreme Court opined that a son could have poisoned his elderly mother, even though the mother's ill health was a substantial factor in causing her death.

This is true even if the victim's preexisting physical condition also was a substantial factor causing death. (citation omitted) ‘So long as a victim's predisposing physical condition, regardless of its cause, is not the *only* substantial factor bringing about his death, that condition . . . in no way destroys the [defendant's] criminal responsibility for the death.’ (citations omitted).

Chain of Events

The language defining the natural and probable consequences doctrine is derived from *People v. Cervantes* (2001) 26 Cal.4th 860, 866:

In homicide cases, a “cause of the death of [the decedent] is an act or omission that sets in motion a chain of events that produces as a

direct, natural and probable consequence of the act or omission the death of [the decedent] and without which the death would not occur.” (citation omitted)

Independent Intervening Act

In *People v. Cervantes* (2001) 26 Cal.4th 860, the Supreme Court held that the willful and malicious murder of another gang member that was not in direct response to the defendant’s provocative act was an independent intervening act. “The free, deliberate, and informed intervention of a second person, who intends to exploit the situation created by the first, but is not acting in concert with him, is normally held to relieve the first actor of criminal responsibility.” (*Id.* at pp. 871, 874 [quoting Hart & Honore, *Causation in the Law* (2d ed. 1985) p. 326, fn. omitted]; see *People v. Armitage* (1987) 194 Cal.App.3d 405, 420–21 [defining independent intervening cause].)

The evidence was insufficient as a matter of law to support the defendant’s conviction of provocative act murder because it failed to establish the essential element of proximate causation (*Cervantes, supra*, 26 Cal.4th at p. 872):

The facts of this case are distinguishable from the classic provocative act murder case in a number of respects. Defendant was not the initial aggressor in the incident that gave rise to the provocative act. [Footnote omitted.] There was no direct evidence that [the victim]’s unidentified murderers [footnote omitted] were even present at the scene of the provocative act . . . Defendant himself was not present at the scene where [the victim] was fatally gunned down . . . [Footnote omitted.] But the critical fact that distinguishes this case from other provocative act murder cases [footnote omitted] is that here the actual murderers were not responding to defendant’s provocative act by shooting back at him or an accomplice, in the course of which someone was killed. . . . The willful and malicious murder of [the victim] at the hands of others was an independent intervening act on which defendant’s liability for the murder could not be based.

Provocative Acts of Deceased Co-Felon

In *People v. Mai* (1994) 22 Cal.App.4th 117, 128 the Court of Appeal found that the trial court should have instructed the jury that evidence of provocative acts of a co-felon who is killed by a victim or the police is “not relevant to the determination of whether his killing was, in fact, a murder for which his accomplices could be held responsible.” *Citations omitted.* That holding should be considered in light of *People v. Garcia* (1999) 69 Cal.App.4th 1324, 1332:

Defendant is relieved from liability for the death of [the accomplice victim] only if [the accomplice victim's] actions were the sole cause of his own death.

742. Transferred Intent

- 1 <A. Only unintended victim is killed.>
2 **[If the defendant intended to kill one person, but by mistake or accident killed**
3 **someone else instead, then the crime, if any, is the same as if the intended**
4 **person had been killed.]**
5
6 <B. Both intended and unintended victims are killed.>
7 **[If the defendant intended to kill one person, but by mistake or accident also**
8 **killed someone else, then the crime, if any, is the same for the unintended**
9 **killing as you determine it to be for the intended killing.]**
-

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction if transferred intent is one of the general principles of law relevant to the issues raised by the evidence. (*People v. Hood* (1969) 1 Cal.3d 444, 449.)

Give optional paragraph A if only an unintended victim is killed. Give optional paragraph B if both the intended victim and an unintended victim or victims are killed. (See discussion in Commentary, below.)

Any defenses that apply to the intended killing apply to the unintended killing as well. (*People v. Mathews* (1979) 91 Cal.App.3d 1018, 1024.)

Do not give this instruction for a charge of attempted murder. The transferred intent doctrine does not apply to attempted murder. A defendant's guilt of attempted murder must be judged separately for each alleged victim. (*People v. Bland* (2002) 28 Cal.4th 313, 327–328, 331; see Instruction 760, Attempted Murder.)

Related Instructions

Always give the appropriate related homicide instructions.

AUTHORITY

Common Law Doctrine of Transferred Intent ▶ *People v. Mathews* (1979) 91 Cal.App.3d 1018, 1024.

1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Elements, §§ 13–15, pp. 215–219.

COMMENTARY

Intent Transfers to Unintended Victim

“[A] person’s intent to kill the intended target is not ‘used up’ once it is employed to convict the person of murdering that target. It can also be used to convict of the murder of others the person also killed. . . . [A]ssuming legal causation, a person maliciously intending to kill is guilty of the murder of all persons actually killed. If the intent is premeditated, the murder or murders are first degree. . . . Intent to kill transfers to an unintended homicide victim even if the intended target is killed.” (*People v. Bland* (2002) 28 Cal.4th 313, 322, 323–324, 326 [disapproving *People v. Birreuta* (1984) 162 Cal.App.3d 454, 458, 463].)

STAFF NOTES

This instruction is a plain language rendering of the transferred intent doctrine as set forth in *People v. Scott* (1996) 14 Cal.4th 544, 546:

[A] defendant who shoots with an intent to kill but misses and hits a bystander instead should be punished for a crime of the same seriousness as the one he tried to commit against his intended victim.

Staff used both “accident” and “mistake” in this instruction because both words are used to describe this doctrine in the case law, and their combined meanings should convey the broader scope of situations in which this doctrine may apply. See *People v. Birreuta* (1984) 162 Cal.App.3d 454, 460:

The function of the transferred intent doctrine is to insure the adequate punishment of those who **accidentally** kill innocent bystanders, while failing to kill their intended victims. But for the transferred intent doctrine, such people could escape punishment for murder, even though they deliberately and premeditatedly killed – because of their “lucky” **mistake**. (Emphasis added)

Staff’s draft of this instruction is very close to the Michigan CJI2d 16.22, which reads as follows:

If the defendant intended to kill one person, but by mistake or accident killed another person, the crime is the same as if the first person had actually been killed.

Although the term “transferred intent” is underinclusive, its continued use is recognized by Justice Chin in *People v. Bland* (2002) 28 Cal.4th 313, 319, fn. 1:

Someone who premeditates a killing but kills the wrong person is guilty of a premeditated, not just intentional, murder. [Citation.] A more accurate designation might be “transferred mental state.” However, because the term “transferred intent” is so well established in the cases, we will continue to use it on the understanding that it is not limited merely to intent but extends at least to premeditation.

Bland expressed no opinion about application of the doctrine to other crimes (*id.* at p. 331, fn. 7):

N. 7. We express no opinion regarding the application of transferred intent to a crime, such as battery, that is not inchoate and does not involve a homicide. (See, e.g., *State v. Stringfield* (Kan.Ct.App. 1980) 4 Kan. App. 2d 559, 608 P.2d 1041 [transferred intent applies to aggravated battery].)

743. Conspiracy to Commit Murder

1 **The defendant[s] (is/are) charged [in Count ____] with conspiracy to commit**
2 **murder.**

3
4 **To prove that the defendant[s] (is/are) guilty of this crime, the People must**
5 **prove that:**

6
7 **1. The defendant[s] [and _____ <insert name[s] or description[s]**
8 **of alleged coconspirator[s]>] intended to and did agree to commit**
9 **murder.**

10
11 **2. At the time of the agreement, the defendant[s] [and _____**
12 **<insert name[s] or description[s] of alleged coconspirator[s]>]**
13 **intended to commit murder.**

14
15 **3. (The defendant[s]/ [and/or] _____ <insert name[s] or**
16 **description[s] of alleged coconspirator[s]>) committed [at least one**
17 **of] the overt act[s] alleged in the (information/indictment) in order**
18 **to commit murder.**

19
20 **AND**

21
22 **4. At least one of these overt acts was committed in California.**

23
24 **[I (have given/will give) you other instructions on the crime of murder.]**

25
26 **[For the purpose of this instruction, murder is the unlawful killing of a**
27 **human being [or fetus] with a state of mind called express malice**
28 **aforethought. A person has express malice aforethought if he or she intends**
29 **to kill.]**

30
31 **The People do not need to prove that the (the defendant[s]/ [and/or]**
32 **_____ <insert name[s] or description[s] of alleged coconspirator[s]>)**
33 **actually met or came to a detailed, formal agreement to commit murder. The**
34 **People must prove, however, that (the defendant[s]/ [and/or] _____**
35 **<insert name[s] or description[s] of alleged coconspirator[s]>) had a mutual**
36 **understanding and intent to commit murder.**

37
38 **An overt act is an act by one or more of the conspirators that is done to help**
39 **accomplish the goal of the conspiracy. The overt act must happen after the**

defendant(s) (has/have) agreed to commit the crime. The overt act must be more than the act of agreeing or planning to commit the crime, but it does not need to be a criminal act itself.

[You must all agree that at least one overt act alleged in the (information/indictment) was committed in California by at least one conspirator, but you do not all need to agree on which specific act or acts were committed or who committed the act or acts.]

[You must make a separate decision whether each defendant was a member of the alleged conspiracy.]

[A member of a conspiracy does not need to personally know the identity or functions of all the other conspirators.]

[Merely accompanying or associating with other persons without any criminal intent is not a conspiracy.]

[A *fetus* is an unborn human being that has developed for at least seven to eight weeks in the mother's body.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime. Conspiracy is an inchoate crime distinct from the underlying offense. (See *People v. Morante* (1999) 20 Cal.4th 403, 416.)

In elements 1 and 2, give either “The defendants intended . . .” or “The defendant and _____ <insert name[s] and description[s] of alleged coconspirator[s]> intended . . .” If inserting names or descriptions of coconspirators, insert the same names or descriptions into elements 1 and 2. (See *People v. Liu* (1996) 46 Cal.App.4th 1119, 1131.) See also the Commentary section below.

In element 3, name either the defendant or name or describe one of the other alleged coconspirators as committing at least one overt act.

If the court is also instructing the jury on murder, give the first bracketed paragraph stating this. If the court is not giving separate murder instructions, give the second bracketed paragraph defining murder.

Give the bracketed paragraph on unanimity if multiple overt acts are alleged in connection with a single conspiracy. (See *People v. Russo* (2001) 25 Cal.4th 1124, 1135–1136.)

Give the bracketed paragraph on separately deciding about multiple defendants if more than one defendant is charged with conspiracy. (See *People v. Fulton* (1984) 155 Cal.App.3d 91, 101; *People v. Crain* (1951) 102 Cal.App.2d 566, 581–582.)

Give the bracketed paragraph on personal knowledge of conspiracy members on request if there is evidence that the defendant did not personally know all the alleged coconspirators. (See *People v. Van Eyk* (1961) 56 Cal.2d 471, 479.)

Give the bracketed paragraph on mere association on request if the defendant argues he or she merely associated with an alleged conspirator without any criminal intent. (See *People v. Toledo-Corro* (1959) 174 Cal.App.2d 812, 820.)

Related Instructions

If murder is also alleged in a separate count, also give Instruction ____, Separately Decide Each Defendant's Innocence or Guilt, as well as the appropriate instructions defining the substantive crimes. (See *People v. Fulton* (1984) 155 Cal.App.3d 91, 101.)

See also Instruction 550, Conspiracy; Instruction 720, Murder With Malice Aforethought; and Instruction 735, First Degree Felony Murder: Pursuant to Conspiracy.

AUTHORITY

Elements ▶ Pen. Code, §§ 182(a), 183; *People v. Morante* (1999) 20 Cal.4th 403, 416; *People v. Swain* (1996) 12 Cal.4th 593, 600; *People v. Liu* (1996) 46 Cal.App.4th 1119, 1128.

Overt Act Defined ▶ Pen. Code, § 184; *People v. Saugstad* (1962) 203 Cal.App.2d 536, 549–550; *People v. Zamora* (1976) 18 Cal.3d 538, 549, fn. 8.

Elements of Underlying Offense ▶ *People v. Fenenbock* (1996) 46 Cal.App.4th 1688, 1706; *People v. Cortez* (1998) 18 Cal.4th 1223, 1238–1239.

Express Malice Murder ▶ *People v. Swain* (1996) 12 Cal.4th 593, 602, 603, 607.

Premeditated First Degree Murder ▶ *People v. Cortez* (1998) 18 Cal.4th 1223, 1232.

Specific Intent for Conspiracy ▶ *People v. Miller* (1996) 46 Cal.App.4th 412, 423–426.

Unanimity on Specific Overt Act Not Required ▶ *People v. Russo* (2001) 25 Cal.4th 1124, 1133–1135.

1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Elements, §§ 77, 78, pp. 289–292.

COMMENTARY

It is sufficient to refer to coconspirators in the accusatory pleading as “persons unknown.” (*People v. Sacramento Butchers’ Protective Association* (1910) 12 Cal.App. 471, 483; *People v. Roy* (1967) 251 Cal.App.2d 459, 463; see 1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Elements, § 82, p. 297.) Nevertheless, this instruction assumes the prosecution has named at least two members of the alleged conspiracy, whether charged or not.

Conspiracy to commit murder cannot be based on a theory of implied malice, as held in *People v. Swain* (1996) 12 Cal.4th 593, 602, 603, 607.

All conspiracy to commit murder is necessarily conspiracy to commit premeditated first degree murder, as held in *People v. Cortez* (1998) 18 Cal.4th 1223, 1232.

LESSER INCLUDED OFFENSES

There is no crime of conspiracy to commit attempted murder. (*People v. Iniguez* (2002) 96 Cal.App.4th 75, 79.)

RELATED ISSUES

Acquittal of Coconspirators

The “rule of consistency” is abandoned in conspiracy cases. The acquittal of all alleged conspirators but one does not require the acquittal of the remaining alleged conspirator. (*People v. Palmer* (2001) 24 Cal.4th 856, 858, 864–865; see *People v. Lawley* (2001) 27 Cal.4th 102, 163–164 [judgment acquitting one defendant does not generally bar subsequent criminal liability of codefendant under collateral estoppel principles].)

Multiple Conspiracies

Separately planned murders are punishable as separate conspiracies, even if the separate murders are incidental to a single objective. (*People v. Liu* (1996) 46 Cal.App.4th 1119, 1133.)

STAFF NOTES

Conspiracy to commit murder cannot be based on a theory of implied malice, as held in *People v. Swain* (1996) 12 Cal.4th 593, 602, 603, 607:

[C]onspiracy is a specific intent crime requiring an intent to agree or conspire, and a further intent to commit the target crime, here murder, the object of the conspiracy. Since murder committed with intent to kill is the functional equivalent of *express malice* murder, conceptually speaking, no conflict arises between the specific intent element of conspiracy and the specific intent requirement for such category of murders. Simply put, where the conspirators agree or conspire with specific intent to kill and commit an overt act in furtherance of such agreement, they are guilty of conspiracy to commit express malice murder.

...

The element of malice aforethought in implied malice murder cases is therefore derived or "implied," in part through hindsight so to speak, from (i) proof of the specific intent to do some act dangerous to human life *and* (ii) the circumstance that a killing has resulted therefrom. It is precisely due to this nature of *implied malice* murder that it would be *illogical* to conclude one can be found guilty of conspiring to commit murder where the requisite element of malice is implied. Such a construction would be at odds with the very nature of the crime of conspiracy--an "inchoate" crime that "fixes the point of legal intervention at [the time of] agreement to commit a crime," and indeed "reaches further back into preparatory conduct than [the crime of] attempt" . . . --precisely because commission of the crime could never be established, or be deemed complete, unless and until a killing actually occurred.

...

We conclude that a conviction of conspiracy to commit murder requires a finding of intent to kill, and cannot be based on a theory of implied malice.

All conspiracy to commit murder is necessarily conspiracy to commit premeditated first degree murder, as held in *People v. Cortez* (1998) 18 Cal.4th 1223, 1232:

[W]here two or more persons conspire to commit murder--i.e., intend to agree or conspire, further intend to commit the target offense of murder, and perform one or more overt acts in furtherance of the planned murder--each has acted with a state of mind "functionally indistinguishable from the mental state of premeditating the target offense of murder." . . . The mental state required for conviction of *conspiracy* to commit murder necessarily establishes premeditation and deliberation of the target offense of murder--

hence all murder conspiracies are conspiracies to commit first degree murder, so to speak. More accurately stated, conspiracy to commit murder is a unitary offense *punishable* in every instance in the same manner as is first degree murder under the provisions of Penal Code section 182. [Citation omitted.] n3

Fn. 3 . . . We are not concluding conspiracy to commit murder "requir[es] only intent to kill"--we are instead merely recognizing that the mental state required for conviction of conspiracy to commit express malice murder *necessarily equates with and establishes* the mental state of deliberate and premeditated first degree murder. . . . [I]t is inconceivable that two persons can harbor the mental state required to conspire to commit express malice murder, and, we might add, additionally commit an overt act or acts in furtherance thereof as required for conviction of the crime of conspiracy, without being deemed to have willfully "premeditated and deliberated" the commission of that murder.

Cortez concluded (*id.* at pp. 1237–1238):

We . . . conclude all conspiracy to commit murder is necessarily conspiracy to commit premeditated and deliberated first degree murder, and that all murder conspiracies are punishable in the same manner as murder in the first degree pursuant to the punishment provisions of Penal Code section 182. The time has come to disapprove our early decision in *Horn, supra*, 12 Cal. 3d 290, to the extent it is inconsistent with the views expressed herein.

Substantive Murder Instructions

Cortez held that the jury need not be instructed on the definition of premeditation and deliberation in all murder conspiracy cases (*id.* at p. 1238):

Given our conclusion that conspiracy to commit murder is a unitary offense punishable in every instance with the penalty prescribed for first degree murder, it follows logically that there was no occasion or requirement for the jury to determine the "degree" of the underlying target offense of murder, and thus no need for specific instruction on premeditation and deliberation respecting the conspiracy count.

Cortez did hold, however, that the jury must be instructed on the elements of murder (*id.* at p. 1239):

[I]nstructions defining the essential elements of murder were required because defendant was charged with conspiring with his deceased

accomplice . . . to commit the underlying criminal objective or target offense of murder *simpliciter*. “[C]onspiracy is a specific intent crime requiring an intent to agree or conspire, and a further intent to commit the target crime, here murder, the object of the conspiracy.” . . . Instructions on the basic elements of murder were therefore necessary to guide the jury in its determination of whether defendant harbored the requisite dual specific intent for conviction of conspiracy to commit murder.

The necessary instructions were given in this case. The jury was instructed that murder is “the unlawful killing of a human being . . . with malice aforethought,” and malice aforethought was further specifically defined as an intent to kill. These instructions were sufficient to define the elements of the target offense of murder *simpliciter* in connection with the charged conspiracy.

Multiple Conspiracies to Commit Murder

As a general rule, courts look to whether there is a single objective in deciding whether there are multiple conspiracies. Separately planned murders, however, are punishable as separate conspiracies, as discussed in *People v. Liu* (1996) 46 Cal.App.4th 1119, 1133:

Just as the commission of several murders of separate identifiable victims results in more harm than the commission of a single murder, a conspiracy to commit several murders is a more serious wrong than a conspiracy to commit a single murder, no matter the extent to which the several murders are planned for the accomplishment of a single criminal purpose. Each separately planned murder is the goal of a separate conspiracy.

Attempt

One appellate court holds that there is no crime of conspiracy to commit an attempted murder [or apparently any other attempted crime] (*People v. Iniguez* (2002) 96 Cal.App.4th 75, 79):

The conduct defendant pleaded to, conspiracy to commit attempted murder, is a conclusive legal falsehood. This is because the crime of attempted murder requires a specific intent to actually commit the murder, while the agreement underlying the conspiracy pleaded to contemplated no more than an ineffectual act. No one can simultaneously intend to do and not do the same act, here the actual commission of a murder. Defendant has pleaded to a nonexistent offense.

750. Voluntary Manslaughter: Heat of Passion

1 **A killing that would otherwise be murder is reduced to voluntary**
2 **manslaughter if the defendant killed someone because of a sudden quarrel or**
3 **in the heat of passion.**

4
5 **The defendant killed someone because of a sudden quarrel or in the heat of**
6 **passion if:**

7
8 **1. The defendant was provoked to kill.**

9
10 **2. As a result of the provocation, the defendant killed rashly and**
11 **under the influence of intense emotion that obscured (his/her)**
12 **reasoning or judgment.**

13
14 **AND**

15
16 **3. The provocation would have caused an ordinary and reasonable**
17 **person of average disposition to act rashly and without due**
18 **deliberation, that is, from passion rather than from judgment.**

19
20 **Heat of passion does not require anger or rage. It can be any violent or**
21 **intense emotion that causes a person to act without due deliberation and**
22 **reflection.**

23
24 **In order for heat of passion to reduce a murder to voluntary manslaughter,**
25 **the defendant must have acted under the direct and immediate influence of**
26 **provocation as I have defined it. While no specific type of provocation is**
27 **required, slight or remote provocation is not sufficient.**

28
29 **You must decide whether the provocation was sufficient by determining how**
30 **an ordinarily reasonable person of average disposition would react in the**
31 **same situation knowing the same facts. The defendant is not allowed to set up**
32 **(his/her) own standard of conduct. It is not enough that the defendant was**
33 **actually provoked. You must also decide if an ordinarily prudent person**
34 **would have been provoked.**

35
36 **[If enough time passed between the provocation and the killing for an**
37 **ordinarily reasonable person of average disposition to “cool off” and regain**
38 **his or her clear reasoning and judgment, then the murder is not reduced to**
39 **voluntary manslaughter on this basis.]**

40
41 **The provocation may have occurred over a short or long period of time.**

42
43 **The People have the burden of proving beyond a reasonable doubt that**
44 **the defendant did not kill as the result of a sudden quarrel or in the**
45 **heat of passion. If the People have not met this burden, you must find**
46 **the defendant not guilty of murder.**

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on voluntary manslaughter on either theory, heat of passion or imperfect self-defense, when evidence of either is “substantial enough to merit consideration” by the jury. (*People v. Breverman* (1998) 19 Cal.4th 142, 153–163; *People v. Barton* (1995) 12 Cal.4th 186, 201.)

Related Instructions

Instruction 707, Excusable Homicide: Accident in the Heat of Passion.

AUTHORITY

Elements ▶ Pen. Code, § 192(a).

Heat of Passion Defined ▶ *People v. Breverman* (1998) 19 Cal.4th 142, 163;
People v. Valentine (1946) 28 Cal.2d 121, 139; *People v. Lee* (1999) 20
Cal.4th 47, 59.

1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against the Person,
§§ 207–219.

LESSER INCLUDED OFFENSES

Attempted Voluntary Manslaughter ▶ *People v. Von Ronk* (1985) 171 Cal.App.3d
818, 824–825; *People v. Williams* (1980) 102 Cal.App.3d 1018, 1024–
1026.

Involuntary manslaughter is *not* a lesser included offense of voluntary
manslaughter. (*People v. Orr* (1994) 22 Cal.App.4th 780, 784.)

RELATED ISSUES

Heat of Passion: Sufficiency of Provocation—Examples

In *People v. Breverman*, sufficient evidence of provocation existed where a mob of young men trespassed onto defendant's yard and attacked defendant's car with weapons. (*People v. Breverman* (1998) 19 Cal.4th 142, 163–164.) Provocation has also been found sufficient based on the murder of a family member (*People v. Brooks* (1986) 185 Cal.App.3d 687, 694), a sudden and violent quarrel (*People v. Elmore* (1914) 167 Cal. 205, 211), and the infidelity of a wife (*People v. Berry* (1976) 18 Cal.3d 509, 515) or lover (*People v. Borchers* (1958) 50 Cal.2d 321, 328–329).

In the following cases, provocation has been found inadequate as a matter of law: evidence of name calling, smirking, or staring and looking stone-faced (*People v. Lucas* (1997) 55 Cal.App.4th 721, 739); insulting words or gestures (*People v. Odell David Dixon* (1961) 192 Cal.App.2d 88, 91); refusing to have sex in exchange for drugs (*People v. Michael Sims Dixon* (1995) 32 Cal.App.4th 1547, 1555); a victim's resistance against a rape attempt (*People v. Rich* (1988) 45 Cal.3d 1036, 1112); the desire for revenge (*People v. Fenenbock* (1996) 46 Cal.App.4th 1688, 1704); and a long history of criticism, reproach and ridicule where the defendant had not seen the victims for over two weeks prior to the killings (*People v. Kanawyer* (Dec. 3, 2003) 3rd App. Dist. C041832). In addition the Supreme Court has suggested that mere vandalism to an automobile is insufficient for provocation. (See *People v. Breverman* (1998) 19 Cal.4th 142, 164, fn. 11; *In re Christian S.* (1994) 7 Cal.4th 768, 779, fn. 3.)

Heat of Passion: Types of Provocation

Heat of passion does not require anger or rage. It can be “any violent, intense, high-wrought or enthusiastic emotion.” (*People v. Breverman* (1998) 19 Cal.4th 142, 163–164.)

Heat of Passion: Defendant Initial Aggressor

“[A] defendant who provokes a physical encounter by rude challenges to another person to fight, coupled with threats of violence and death to that person and his entire family, is not entitled to claim that he was provoked into using deadly force when the challenged person responds without apparent (or actual) use of such force.” (*People v. Johnston* (Dec. 4, 2003) 2nd pp. Dist. B163966.)

Heat of Passion: Defendant's Own Standard

Unrestrained and unprovoked rage does not constitute heat of passion, and a person of extremely violent temperament cannot substitute his or her own subjective standard for heat of passion. (*People v. Valentine* (1946) 28 Cal.2d 121,

139 [court approved admonishing jury on this point]; *People v. Danielly* (1949) 33 Cal.2d 362, 377; *People v. Berry* (1976) 18 Cal.3d 509, 515.) The objective element of this form of voluntary manslaughter is not satisfied by evidence of a defendant's "extraordinary character and environmental deficiencies." (*People v. Steele* (2002) 27 Cal.4th 1230, 1253 [evidence of intoxication, mental deficiencies, and psychological dysfunction due to traumatic experiences in Vietnam are not provocation by the victim].)

Premeditation and Deliberation—Heat of Passion Provocation

Provocation and heat of passion may reduce murder from first to second degree. (*People v. Thomas* (1945) 25 Cal.2d 880, 903 [provocation raised reasonable doubt about the idea of premeditation or deliberation, "leaving the homicide as murder of the second degree; i.e., an unlawful killing perpetrated with malice aforethought but without premeditation and deliberation"].) There is, however, no sua sponte duty to instruct the jury on this issue because provocation in this context is a defense to the element of deliberation, not an element of the crime, as it is in the manslaughter context. (*People v. Middleton* (1997) 52 Cal.App.4th 19, 32–33.)

Fetus

Manslaughter does not apply to the death of a fetus. (*People v. Carlson* (1974) 37 Cal.App.3d 349, 355.) "While the Legislature has seen fit to include the killing of a fetus, as well as a human being, [within] the definition of murder under Pen. Code, § 187, subd. (a), it has left untouched the provisions of Pen. Code, § 192, defining manslaughter [as] the "unlawful killing of a human being." (*Id.* at p. 351.)

751. Voluntary Manslaughter: Imperfect Self-Defense

1 **A killing that would otherwise be murder is reduced to voluntary**
2 **manslaughter if the defendant killed a person because (he/she) acted in**
3 **imperfect self-defense.**

4
5 **If you conclude the defendant acted in complete self-defense, (his/her) action**
6 **was lawful and you must find (him/her) not guilty of any crime. The**
7 **difference between complete self-defense and imperfect self-defense depends**
8 **on whether the defendant's belief in the need to use deadly force was**
9 **reasonable.**

10
11 **The defendant acted in imperfect self-defense if:**

- 12
13 **1. The defendant believed that (he/she/_____ <insert name of**
14 **third party>) was being threatened with death or great bodily**
15 **injury.**
16
17 **2. The defendant believed (he/she/the other person) would be harmed**
18 **immediately.**
19
20 **3. The defendant believed that the use of deadly force was necessary to**
21 **defend against the threat.**

22
23 **AND**

- 24
25 **4. The defendant's beliefs were unreasonable.**
26

27 **[Great bodily injury means significant or substantial physical injury.]**
28

29 **Belief in future harm is not sufficient, no matter how great or how likely the**
30 **harm is believed to be. The defendant must have believed there was**
31 **immediate danger of violence to (himself/herself/someone else).**
32

33 **In evaluating the defendant's beliefs, consider all the circumstances as they**
34 **were known and appeared to the defendant.**
35

36 **The People have the burden of proving beyond a reasonable doubt that the**
37 **defendant was not acting in imperfect self-defense. If the People have not met**
38 **this burden, you must find the defendant not guilty of murder.**

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on voluntary manslaughter on either theory, heat of passion or imperfect self-defense, when evidence of either is “substantial enough to merit consideration” by the jury. (*People v. Breverman* (1998) 19 Cal.4th 142, 153–163; *People v. Barton* (1995) 12 Cal.4th 186, 201.)

Perfect Self-Defense

Most courts hold that an instruction on imperfect self-defense **is required** in every case in which a court instructs on perfect self-defense. If there is substantial evidence of a defendant’s belief in the need for self-defense, there will *always* be substantial evidence to support an imperfect self-defense instruction because the reasonableness of that belief will always be at issue. (See *People v. Ceja* (1994) 26 Cal.App.4th 78, 85–86 [overruled in part by *People v. Blakely* (2000) 23 Cal.4th 82, 91]; see also *People v. DeLeon* (1997) 10 Cal.App.4th 815, 824.) The court in *People v. Rodriguez* disagreed, however, and found that an imperfect self-defense instruction was not necessary when the defendant’s version of the crime “could only lead to an acquittal based on justifiable homicide,” and when the prosecutor’s version of the crime could only lead to a conviction of first degree murder. (See *People v. Rodriguez* (1997) 53 Cal.App.4th 1250, 1275; see also *People v. Williams* (1992) 4 Cal.4th 354, 362 [in a rape prosecution, the court was not required to give a mistake-of-fact instruction where the two sides gave wholly divergent accounts with no middle ground to support a mistake-of-fact instruction].)

Related Instructions

Instruction 701, Justifiable Homicide: Self-Defense or Defense of Another.

AUTHORITY

Elements ► Pen. Code, § 192(a).

Imperfect Self-Defense Defined ► *People v. Flannel* (1979) 25 Cal.3d 668, 680–683; *People v. Barton* (1995) 12 Cal.4th 186, 201; *In re Christian S.* (1994) 7 Cal.4th 768, 773; see *People v. Uriarte* (1990) 223 Cal.App.3d 192, 197–198 [insufficient evidence to support defense of another person].

1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against the Person, § 210.

LESSER INCLUDED OFFENSES

Attempted Voluntary Manslaughter ▶ *People v. Von Ronk* (1985) 171 Cal.App.3d 818, 822; *People v. Williams* (1980) 102 Cal.App.3d 1018, 1024–1026.

Involuntary manslaughter is *not* a lesser included offense of voluntary manslaughter. (*People v. Orr* (1994) 22 Cal.App.4th 780, 784.)

RELATED ISSUES

Battered Woman's Syndrome

Evidence relating to battered woman's syndrome may be considered by the jury when deciding if the defendant actually feared the batterer and if that fear was reasonable. (See *People v. Humphrey* (1996) 13 Cal.4th 1073, 1082–1089, disapproving *People v. Aris* (1989) 215 Cal.App.3d 1178, 1189 [it was error for the court to instruct the jury that evidence of battered woman's syndrome was only relevant to the defendant's actual belief].)

Blakeley Not Retroactive

The decision in *Blakeley*—that one who, acting with conscious disregard for life, unintentionally kills in imperfect self-defense is guilty of voluntary manslaughter—may not be applied to defendants whose offense occurred prior to *Blakeley*'s June 2, 2000, date of decision. (*People v. Blakeley* (2000) 23 Cal.4th 82, 92.) If a defendant asserts a killing was done in an honest but mistaken belief in the need to act in self-defense and the offense occurred prior to June 2, 2000, the jury must be instructed that an unintentional killing in imperfect self-defense is involuntary manslaughter. (*People v. Johnson* (2002) 98 Cal.App.4th 566, 576–577; *People v. Blakeley*, *supra*, 23 Cal.4th at p. 93.)

Defendant Is Initial Aggressor

The initial aggressor or perpetrator of a crime may not invoke the doctrine of self-defense against the victim's legally justified acts. (See *In re Christian S.* (1994) 7 Cal.4th 768, 773, fn. 1; see also *People v. Balderas* (1985) 41 Cal.3d 144, 196.)

When Defendant Is Delusional—Split in Authority

In *People v. Gregory* (2002) 101 Cal.App.4th 1149, 1172, REVIEW GRANTED and DEPUBLISHED Nov. 26, 2002—S110450, the court held, that “imperfect self-defense remains a species of mistake of fact . . .; as such, it cannot be founded on delusion.” *People v. Wright* (Aug. 4, 2003, C039031) 03 C.D.O.S. 6991, 6995, REVIEW GRANTED and DEPUBLISHED Nov. 12, 2003—S119067, rejected *Gregory* and concluded that imperfect self-defense could be based on delusions.

Inapplicable to Felony Murder

Imperfect self-defense does not apply to felony murder. “Because malice is irrelevant in first and second degree felony murder prosecutions, a claim of imperfect self-defense, offered to negate malice, is likewise irrelevant.” (See *People v. Tabios* (1998) 67 Cal.App.4th 1, 6; see also *People v. Anderson* (1991) 233 Cal.App.3d 1646, 1666; *People v. Lousaunau* (1986) 181 Cal.App.3d 163, 170.)

Threats From Third Parties

The jury may consider evidence of threats against the defendant by third parties if there is evidence that the defendant associated the victim with those threats. (*People v. Minifie* (1996) 13 Cal.4th 1055, 1069 [in a self-defense case where the court also applied reasoning to imperfect self-defense].)

752. Voluntary Manslaughter: Murder Not Charged

1 **The defendant is charged [in Count ____] with voluntary manslaughter. To**
2 **prove that the defendant is guilty of voluntary manslaughter, the People must**
3 **prove that:**

4
5 **1. The defendant committed an act that caused the death of another**
6 **person.**

7
8 **[AND]**
9

10 **2. The defendant intended to kill someone.**

11
12 **[AND]**
13

14 **3. (He/She) killed without lawful excuse or justification.]**
15

16 **Or the People must prove that:**

17
18 **1. The defendant intentionally committed an act that caused the death**
19 **of another person.**

20
21 **2. The natural and probable consequences of the act were dangerous**
22 **to human life.**

23
24 **3. At the time (he/she) acted, (he/she) knew the act was dangerous to**
25 **human life.**

26
27 **[AND]**
28

29 **4. (He/She) deliberately acted with conscious disregard for human life.**

30
31 **[AND]**
32

33 **5. (He/She) killed without lawful excuse or justification.]**
34

35 ***A natural and probable consequence* is one that a reasonable and prudent**
36 **person would know is likely to happen if nothing unusual intervenes. In**
37 **deciding whether a consequence is natural and probable, consider all of the**
38 **circumstances established by the evidence.**
39

40 [An act causes death if the death is the direct, natural, and probable
41 consequence of the act.]

42
43 [There may be more than one cause of death. An act causes death only if it is
44 a substantial factor in causing the death. A *substantial factor* is more than a
45 trivial or remote factor. However, it does not need to be the only factor that
46 causes the death.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime. The court should **give this instruction only** in cases where voluntary manslaughter is charged alone, without murder. In such cases,

[A] conviction of voluntary manslaughter may be sustained upon proof and findings that the defendant committed an unlawful and intentional homicide. Provocation and imperfect self-defense are not additional elements of voluntary manslaughter which must be proved and found beyond reasonable doubt in order to permit a conviction of that offense.

(*People v. Rios* (2000) 23 Cal.4th 450, 463, 469.) “[V]oluntary manslaughter . . . is also committed when one kills unlawfully, and with *conscious disregard for life*.” (*People v. Rios, supra*, 23 Cal.4th at p. 461, fn. 7 [emphasis in original, citing *People v. Blakeley* (2000) 23 Cal.4th 82, 90–91; *People v. Lasko* (2000) 23 Cal.4th 101, 108–110].)

If causation is at issue, the court has a **sua sponte** duty to instruct on proximate cause. (*People v. Bernhardt* (1963) 222 Cal.App.2d 567, 590–591.) If the evidence indicates that there was only one cause of death, the court should give the “direct, natural, and probable” language in the first bracketed paragraph on causation. If there is evidence of multiple causes of death, the court should give the “substantial factor” instruction in the second bracketed paragraph on causation. (See *People v. Autry* (1995) 37 Cal.App.4th 351, 363; *People v. Pike* (1988) 197 Cal.App.3d 732, 746–747.)

AUTHORITY

Elements ► Pen. Code § 192(a); *People v. Rios* (2000) 23 Cal.4th 450, 463, 469.

1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against the Person, §§ 208–209, pp. 818–821.

RELATED ISSUES

Fetus

Manslaughter does not apply to the death of a fetus. (*People v. Carlson* (1974) 37 Cal.App.3d 349, 355.) “While the Legislature has seen fit to include the killing of a fetus, as well as a human being, [within] the definition of murder under Pen. Code, § 187, subd. (a), it has left untouched the provisions of Pen. Code, § 192, defining manslaughter [as] the ‘unlawful killing of a human being.’ ” (*Id.* at p. 351.)

STAFF NOTES

Statutory Definition of Voluntary Manslaughter

“Manslaughter is the unlawful killing of a human being without malice. It is of three kinds: (a) Voluntary – upon a sudden quarrel or heat of passion. (b) Involuntary [. . .] (c) Vehicular [. . . .]” (Pen. Code § 192(a).)

Rios

In *People v. Rios* (2000) 23 Cal.4th 450), the defendant was originally charged with murder. At the first trial, the jury found the defendant not guilty of murder and deadlocked on voluntary manslaughter. (*Id.* at p. 455.) Thus, at the retrial, the highest charge available to the jury was voluntary manslaughter. (*Ibid.*) The trial court gave an instruction similar to that provided here. The Supreme Court approved of this instruction holding,

[A] conviction of voluntary manslaughter may be sustained upon proof and findings that the defendant committed an unlawful and intentional homicide. Provocation and imperfect self-defense are not additional elements of voluntary manslaughter which must be proved and found beyond reasonable doubt in order to permit a conviction of that offense.

(*Id.* at p. 469.)

In a footnote, the Court observed that “voluntary manslaughter [. . .] is *also* committed when one kills unlawfully, and with *conscious disregard for life*.” (*Id.* at p. 461 n.7. [emphasis in original, citing *People v. Blakeley* (2000) 23 Cal.4th 82, 90-91 and *People v. Lasko* (2000) 23 Cal.4th 101, 108-110].) The phrase “conscious disregard for life,” derives from the definition of implied malice:

[J]uries should be instructed that malice is implied "when the killing results from an intentional act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life" As in the companion case of *People v. Lasko*, for convenience we shall describe this mental state as "conscious disregard for life."

(*People v. Blakeley, supra*, 23 Cal.4th at p. 87.)

This is the definition of implied malice provided elsewhere in these instructions. (See Instruction 720, Murder with Malice Aforethought.)

As a result, the instruction includes the second possible manner for proving voluntary manslaughter without a showing of intent to kill. However, the term “implied malice” is not used in this instruction because voluntary manslaughter is statutorily defined as “an unlawful killing of a human being without malice.” (Pen. Code § 192.) Legally, the “implied malice” is negated by the mitigating circumstances of imperfect self-defense or heat of passion. (See *People v. Blakeley*, *supra*, 23 Cal.4th at pp. 87-88.) In a case in which voluntary manslaughter is the highest charge, the prosecution must prove that the defendant acted with a culpable state of mind equivalent to express or implied malice. (*People v. Rios*, *supra*, 23 Cal.4th at pp. 451, 461.) The prosecution does not have to prove the mitigating circumstances which legally make the offense manslaughter rather than murder. (*Id.* at p. 451.) Thus, although this instruction uses the same elements as “implied malice,” that phrase itself is not used to avoid confusion.

Causation

The bracketed paragraph on causation is also taken from Instruction 720, “Murder with Malice Aforethought.”

755. Involuntary Manslaughter: Lesser Included Offense

1 **When a person commits an unlawful killing but acts without the intent to kill**
2 **or without conscious disregard for human life, then the crime is involuntary**
3 **manslaughter.**

4
5 **The difference between other homicide offenses and involuntary**
6 **manslaughter depends on whether the person was aware of the risk to life**
7 **that his or her actions created and consciously disregarded that risk. An**
8 **unlawful killing done with full knowledge and awareness that the person is**
9 **endangering the life of another, and done in conscious disregard of that risk,**
10 **is voluntary manslaughter or murder. An unlawful killing done without**
11 **intent to kill or without conscious disregard of the risk to human life is**
12 **involuntary manslaughter.**

13
14 **The defendant committed involuntary manslaughter if:**

15
16 **1. (He/she) killed a person without lawful justification or excuse.**

17
18 **AND**

19
20 **2. The defendant acted with criminal negligence.**

21
22 ***Criminal negligence* involves more than ordinary carelessness, inattention, or**
23 **mistake in judgment. A person acts with criminal negligence when:**

24
25 **1. He or she acts in a reckless way that creates a high risk of death or**
26 **great bodily injury.**

27
28 **AND**

29
30 **2. A reasonable person would have known that acting in that way**
31 **would create such a risk.**

32
33 **In other words, a person acts with criminal negligence when the way he or**
34 **she acts is so different from the way an ordinarily careful person would act in**
35 **the same situation that his or her act amounts to disregard for human life or**
36 **indifference to the consequences of that act.**

37
38 ***Great bodily injury* means significant or substantial physical injury.**
39

40 In order to prove murder or voluntary manslaughter, the People have the
41 burden of proving beyond a reasonable doubt that the defendant acted with
42 intent to kill or with conscious disregard for human life. If the People have
43 not met either of these burdens, you must find the defendant not guilty of
44 murder and not guilty of voluntary manslaughter.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on involuntary manslaughter as a lesser included offense of murder when there is sufficient evidence that the defendant lacked malice. (*People v. Glenn* (1991) 229 Cal.App.3d 1461, 1465–1467 [overruled in part in *People v. Blakely* (2000) 23 Cal.4th 82, 91].)

AUTHORITY

Involuntary Manslaughter Defined ► Pen. Code, § 192(b).

1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against the Person, §§ 220–234, pp. 832–844.

LESSER INCLUDED OFFENSES

Involuntary manslaughter is a lesser included offense of both degrees of murder, but it is not a lesser included offense of voluntary manslaughter. (*People v. Orr* (1994) 22 Cal.App.4th 780, 784.)

There is no crime of attempted involuntary manslaughter. (*People v. Johnson* (1996) 51 Cal.App.4th 1329, 1332; *People v. Broussard* (1977) 76 Cal.App.3d 193, 197.)

RELATED ISSUES

Imperfect Self-Defense and Involuntary Manslaughter

Imperfect self-defense is a “mitigating circumstance” that “reduce[s] an intentional, unlawful killing from murder to voluntary manslaughter by *negating the element of malice* that otherwise inheres in such a homicide.” (*People v. Rios* (2000) 23 Cal.4th 450, 461 [citations omitted, emphasis in original].) However, evidence of imperfect self-defense allows a finding of *involuntary* manslaughter, where the evidence allows a finding of *the absence of* (as opposed to *the negation of*) the elements of malice. (*People v. Blakeley* (2000) 23 Cal.4th 82, 91)

[discussing dissenting opinion of Mosk, J.]) In such a situation, the court should also instruct the jury in involuntary manslaughter.

STAFF NOTES

Statutory Definition of Involuntary Manslaughter

“Involuntary – in the commission of an unlawful act, not amounting to a felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection.” (Pen. Code, § 192(b).)

Relationship Between Murder, Voluntary, & Involuntary Manslaughter

Voluntary manslaughter homicides are unlawful killings that have the elements of either express or implied malice and would otherwise be murder; however, heat of passion/provocation or imperfect self defense negate the elements of malice reducing the crime to *voluntary* manslaughter. (*People v. Rios* (2000) 23 Cal.4th 450, 461.) In contrast, *involuntary* manslaughter is committed without the elements of either express or implied malice. (*People v. Rios, supra*, 23 Cal.4th at p. 470 [conc. opn of Mosk, J.].)

Definition of “Without Due Caution and Circumspection” (Criminal Negligence)

“The words lack of ‘due caution and circumspection’ have been heretofore held to be the equivalent of ‘criminal negligence.’” (*People v. Penny* (1955) 44 Cal.2d 861, 879.) In *Penny, supra*, the court adopted the “general rule” regarding criminal negligence stated in American Jurisprudence:

“The negligence must be aggravated, culpable, gross, or reckless, that is, the conduct of the accused must be such a departure from what would be the conduct of an ordinarily prudent or careful man under the same circumstances as to be incompatible with a proper regard for human life, or, in other words, a disregard of human life or an indifference to consequences. [. . .] Aside from the facts that a more culpable degree of negligence is required in order to establish a criminal homicide than is required in a civil action for damages and that contributory negligence is not a defense, criminal responsibility for a negligent homicide is ordinarily to be determined pursuant to the general principles of negligence, the fundamental of which is knowledge, actual or imputed, that the act of the slayer tended to endanger life. The facts must be such that the fatal consequence of the negligent act could reasonably have been foreseen. It must appear that the death was not the result of misadventure, but the natural and probable result of a reckless or culpably negligent act.”

(*Id.* at pp. 879-880 [quoting 26 American Jurisprudence, Homicide, § 210, p. 299].)

The formulation for “criminal negligence” stated in *People v. Rodriguez* (1960)

186 Cal.App.2d 433, 440, is also frequently cited:

It is generally held that an act is criminally negligent when a man of ordinary prudence would foresee that the act would cause a high degree of risk of death or great bodily harm. The risk of death or great bodily harm must be great. Whether the conduct of defendant was wanton or reckless so as to warrant conviction of manslaughter must be determined from the conduct itself and not from the resultant harm. Criminal liability cannot be predicated on every careless act merely because its carelessness results in injury to another. The act must be one which has knowable and apparent potentialities for resulting in death. Mere inattention or mistake in judgment resulting even in death of another is not criminal unless the quality of the act makes it so. The fundamental requirement fixing criminal responsibility is knowledge, actual or imputed, that the act of accused tended to endanger life [citations omitted].

(See *People v. Bernhardt* (1963) 222 Cal.App.2d 567, 588.) [discussing and affirming the *Penny* definition of criminal negligence for involuntary manslaughter]; *People v. Peabody* (1975) 46 Cal.App.3d 43, 47 [criminal negligence definition in the context of child endangerment statute, citing *Penny* and *Rodriguez*]; *People v. Thurmond* (1985) 175 Cal.App.3d 865, 873 [involuntary manslaughter defined, citing *Peabody* citing *Penny* and *Rodriguez*.])

Criminal Negligence Contrasted with Implied Malice

“A finding of gross negligence is made by applying an *objective* test: if a *reasonable person* in defendant’s position would have been aware of the risk involved, then defendant is presumed to have had such an awareness. However, a finding of implied malice depends upon a determination that defendant *actually appreciated* the risk involved, i.e., a *subjective* standard.” (*People v. Watson* (1981) 30 Cal.3d 290, 296-297 [emphasis in original, citations omitted]).

“If a defendant commits an act endangering human life, without realizing the risk involved, the defendant has acted with criminal negligence. By contrast, where the defendant realizes and then acts in total disregard of the danger, the defendant is guilty of murder based on implied malice.” (*People v. Evers* (1992) 10 Cal.App.4th 588, 596.)

Dewberry Instruction

For any case involving a lesser-included offense, the trial court has a sua sponte duty to give a *Dewberry* instruction. (*People v. Crone* (1997) 54 Cal.App.4th 71, 76.) “[W]hen the evidence is sufficient to support a finding of guilt of both the offense charged and a lesser included offense, the jury must be instructed that if they entertain a reasonable doubt as to which offense has been committed, they

must find the defendant guilty only of the lesser offense.” (*People v. Dewberry* (1959) 51 Cal.2d 548, 555.) A *Dewberry* instruction is required whether the lesser-included offense is charged or uncharged. (*People v. Crone, supra*, 54 Cal.App.4th at p. 78.)

756. Involuntary Manslaughter: Murder Not Charged

1 The defendant is charged [in Count ____] with involuntary manslaughter.

2
3 To prove that the defendant is guilty of this crime, the People must prove
4 that:

- 5
6 1. The defendant (committed a crime that was dangerous to human
7 life because of the way in which it was committed/ [or] committed a
8 lawful act, but acted with criminal negligence).

9
10 AND

- 11
12 2. The defendant's acts caused the death of another person.

13
14 [The People allege that the defendant committed the following crime[s]:
15 _____ <insert misdemeanor[s]/infraction[s])/noninherently dangerous
16 (felony/felonies)>. To prove that the defendant committed _____ <insert
17 name[s] of offense[s]>, the People must prove that:

18
19 <LIST ELEMENTS IF THE DEFENDANT IS NOT SEPARATELY
20 CHARGED WITH [A] COUNT[S] ALLEGING [A] SEPARATE
21 VIOLATION[S] OF THE RELEVANT STATUTE[S].>]

22
23 [The People [also] allege that the defendant committed the following lawful
24 act[s] with criminal negligence: _____ <insert act[s] alleged>.]

25
26 [Criminal negligence involves more than ordinary carelessness, inattention, or
27 mistake in judgment. A person acts with criminal negligence when:

- 28
29 1. He or she acts in a reckless way that creates a high risk of death or
30 great bodily injury.

31
32 AND

- 33
34 2. A reasonable person would have known that acting in that way
35 would create such a risk.

36
37 In other words, a person acts with criminal negligence when the way he or
38 she acts is so different from the way an ordinarily careful person would act in

39 the same situation that his or her act amounts to disregard for human life or
40 indifference to the consequences of that act.]

41
42 [An act causes death if the death is the direct, natural, and probable
43 consequence of the act. A *natural and probable consequence* is one that a
44 reasonable and prudent person would know is likely to happen if nothing
45 unusual intervenes. In deciding whether a consequence is natural and
46 probable, consider all of the circumstances established by the evidence.]

47
48 [There may be more than one cause of death. An act causes death only if it is
49 a substantial factor in causing the death. A *substantial factor* is more than a
50 trivial or remote factor. However, it does not need to be the only factor that
51 causes the death.]

52
53 [*Great bodily injury* means significant or substantial physical injury.]

54
55 [The People allege that the defendant committed the following (crime[s]/
56 [and] lawful act[s] with criminal negligence): _____ <insert alleged
57 predicate acts when multiple acts alleged>. You may not find the defendant
58 guilty unless all of you agree that the People have proved that the defendant
59 committed at least one of these alleged acts and you all agree that the same
60 act or acts were proved.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on the elements of the offense.

The court has a **sua sponte** duty to instruct on both theories of involuntary manslaughter (misdemeanor/infracton/noninherently dangerous felony and lawful act committed without due caution and circumspection) if both theories are supported by the evidence. (*People v. Lee* (1999) 20 Cal.4th 47, 61.) In element 1, instruct on either or both of the predicate offense(s) as appropriate.

The court has a **sua sponte** duty to specify the predicate misdemeanor, infracton or noninherently dangerous felony alleged and to instruct on the elements of the predicate offense(s). (*People v. Milham* (1984) 159 Cal.App.3d 487, 506; *People v. Ellis* (1999) 69 Cal.App.4th 1334, 1339; *People v. Burroughs* (1984) 35 Cal.3d 824, 835.)

If causation is at issue, the court has a **sua sponte** duty to instruct on proximate cause. (*People v. Bernhardt* (1963) 222 Cal.App.2d 567, 590–591.) If the evidence

indicates that there was only one cause of death, the court should give the “direct, natural, and probable” language in the first bracketed paragraph on causation. If there is evidence of multiple causes of death, the court should give the “substantial factor” instruction in the second bracketed paragraph on causation. (See *People v. Autry* (1995) 37 Cal.App.4th 351, 363; *People v. Pike* (1988) 197 Cal.App.3d 732, 746–747.)

In cases involving vehicular manslaughter (Pen. Code, § 192(c)), there is a split in authority on whether there is a **sua sponte** duty to give a unanimity instruction when multiple predicate offenses are alleged. (*People v. Gary* (1987) 189 Cal.App.3d 1212, 1218 [overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 481]; *People v. Durkin* (1988) 205 Cal.App.3d Supp. 9, 13; *People v. Mitchell* (1986) 188 Cal.App.3d 216, 222; *People v. Leffel* (1988) 203 Cal.App.3d 575, 586–587.) A unanimity instruction is included in a bracketed paragraph, should the court determine that such an instruction is appropriate. The jury need not specify which act or acts form the basis for their verdict.

AUTHORITY

Involuntary Manslaughter Defined ▶ Pen. Code, § 192(b).

Due Caution and Circumspection ▶ *People v. Penny* (1955) 44 Cal.2d 861, 879–880; *People v. Rodriguez* (1960) 186 Cal.App.2d 433, 440.

Unlawful Act Not Amounting to a Felony ▶ *People v. Thompson* (2000) 79 Cal.App.4th 40, 53.

Unlawful Act Must Be Dangerous Under the Circumstances of Its Commission ▶ *People v. Wells* (1996) 12 Cal.4th 979, 982; *People v. Cox* (2000) 23 Cal.4th 665, 674.

Proximate Cause ▶ *People v. Roberts* (1992) 2 Cal.4th 271, 315–321; *People v. Rodriguez* (1960) 186 Cal.App.2d 433, 440.

Lack of Due Caution and Circumspection Contrasted With Conscious Disregard of Life ▶ *People v. Watson* (1981) 30 Cal.3d 290, 296–297; *People v. Evers* (1992) 10 Cal.App.4th 588, 596.

1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against the Person, §§ 220–234, pp. 832–844.

LESSER INCLUDED OFFENSES

There is no crime of attempted involuntary manslaughter. (*People v. Johnson* (1996) 51 Cal.App.4th 1329, 1332.)

RELATED ISSUES

Due Caution and Circumspection

“The words lack of ‘due caution and circumspection’ have been heretofore held to be the equivalent of ‘criminal negligence.’ ” (*People v. Penny* (1955) 44 Cal.2d 861, 879.)

Felonies as Predicate “Unlawful Act”

“[T]he only logically permissible construction of section 192 is that an unintentional homicide committed in the course of a noninherently dangerous felony may properly support a conviction of involuntary manslaughter, if that felony is committed without due caution and circumspection.” (*People v. Burroughs* (1984) 35 Cal.3d 824, 835 [practicing medicine without a license cannot be predicate offense for second degree murder because not inherently dangerous but can be for involuntary manslaughter even though Penal Code section 192 specifies an “unlawful act, not amounting to a felony”].)

No Inherently Dangerous Requirement for Predicate Misdemeanor/Infraction

“[T]he offense which constitutes the ‘unlawful act’ need not be an inherently dangerous misdemeanor or infraction. Rather, to be an ‘unlawful act’ within the meaning of section 192(c)(1), the offense must be dangerous under the circumstances of its commission. An unlawful act committed with gross negligence would necessarily be so.” (*People v. Wells* (1996) 12 Cal.4th 979, 982.)

Fetus

Manslaughter does not apply to the death of a fetus. (*People v. Carlson* (1974) 37 Cal.App.3d 349, 355.) “While the Legislature has seen fit to include the killing of a fetus, as well as a human being, [within] the definition of murder under Pen. Code, § 187, subd. (a), it has left untouched the provisions of Pen. Code, § 192, defining manslaughter [as] the ‘unlawful killing of a human being.’ ” (*Id.* at p. 351.)

STAFF NOTES

Statutory Definition of Involuntary Manslaughter

“Involuntary – in the commission of an unlawful act, not amounting to a felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection.” (Pen. Code, § 192(b).)

Definition of “Without Due Caution and Circumspection” (Criminal Negligence)

“The words lack of ‘due caution and circumspection’ have been heretofore held to be the equivalent of ‘criminal negligence.’” (*People v. Penny* (1955) 44 Cal.2d 861, 879.) In *Penny, supra*, the court adopted the “general rule” regarding criminal negligence stated in American Jurisprudence:

“The negligence must be aggravated, culpable, gross, or reckless, that is, the conduct of the accused must be such a departure from what would be the conduct of an ordinarily prudent or careful man under the same circumstances as to be incompatible with a proper regard for human life, or, in other words, a disregard of human life or an indifference to consequences. [. . .] Aside from the facts that a more culpable degree of negligence is required in order to establish a criminal homicide than is required in a civil action for damages and that contributory negligence is not a defense, criminal responsibility for a negligent homicide is ordinarily to be determined pursuant to the general principles of negligence, the fundamental of which is knowledge, actual or imputed, that the act of the slayer tended to endanger life. The facts must be such that the fatal consequence of the negligent act could reasonably have been foreseen. It must appear that the death was not the result of misadventure, but the natural and probable result of a reckless or culpably negligent act.”

(*Id.* at pp. 879-880 [quoting 26 American Jurisprudence, Homicide, § 210, p. 299].)

The formulation for “criminal negligence” stated in *People v. Rodriguez* (1960) 186 Cal.App.2d 433, 440, is also frequently cited:

It is generally held that an act is criminally negligent when a man of ordinary prudence would foresee that the act would cause a high degree of risk of death or great bodily harm. The risk of death or great bodily harm must be great. Whether the conduct of defendant was wanton or reckless so as to warrant conviction of manslaughter must be determined from the conduct itself and not from the resultant harm. Criminal liability cannot be predicated on every careless act merely because its carelessness results in

injury to another. The act must be one which has knowable and apparent potentialities for resulting in death. Mere inattention or mistake in judgment resulting even in death of another is not criminal unless the quality of the act makes it so. The fundamental requirement fixing criminal responsibility is knowledge, actual or imputed, that the act of accused tended to endanger life [citations omitted].

(See *People v. Bernhardt* (1963) 222 Cal.App.2d 567, 588.) [discussing and affirming the *Penny* definition of criminal negligence for involuntary manslaughter]; *People v. Peabody* (1975) 46 Cal.App.3d 43, 47 [criminal negligence definition in the context of child endangerment statute, citing *Penny* and *Rodriguez*]; *People v. Thurmond* (1985) 175 Cal.App.3d 865, 873 [involuntary manslaughter defined, citing *Peabody* citing *Penny* and *Rodriguez*].)

Criminal Negligence Contrasted with Implied Malice

A finding of gross negligence is made by applying an *objective* test: if a *reasonable person* in defendant's position would have been aware of the risk involved, then defendant is presumed to have had such an awareness. However, a finding of implied malice depends upon a determination that defendant *actually appreciated* the risk involved, i.e., a *subjective* standard.

(*People v. Watson* (1981) 30 Cal.3d 290, 296-297 [emphasis in original, citations omitted]).

“If a defendant commits an act endangering human life, without realizing the risk involved, the defendant has acted with criminal negligence. By contrast, where the defendant realizes and then acts in total disregard of the danger, the defendant is guilty of murder based on implied malice.” (*People v. Evers* (1992) 10 Cal.App.4th 588, 596.)

Proximate Cause

“In the case of involuntary manslaughter the criminal negligence of the accused must be the proximate cause of the death.” (*People v. Rodriguez* (1960) 186 Cal.App.2d 433, 440.)

Unanimity Instruction

As noted in the Bench Notes, the involuntary manslaughter statute is similar in form and language to the vehicular manslaughter statute. Authority is divided over whether a unanimity instruction must be given for vehicular manslaughter, when more than one unlawful act is presented to the jury as a possible basis of the “unlawful act” element. One court held that,

[I]n order to comply with the requirement that the crime charged be proved beyond a reasonable doubt, a defendant’s guilt as to each element must be proved beyond a reasonable doubt. Thus if the facts of a case present a situation where different acts could constitute the same element of an offense, the defendant is entitled to a unanimity instruction.

(*People v. Gary* (1987) 189 Cal.App.3d 1212, 1218 [overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 481].)

Another court held that,

[T]he unanimity instruction as to a single act need not be given where the acts proved are “just alternate ways of proving a necessary element of the *same offense*,” and do not in themselves constitute separate chargeable offenses.

(*People v. Mitchell* (1986) 188 Cal.App.3d 216, 222 [quoting *People v. Kent* (1981) 125 Cal.App. 3d 2078, 213].)

People v. Durkin (1988) 205 Cal.App.3d Supp. 9, followed *Mitchell* in holding that the “continuous crime” exception exempted the need for a unanimity instruction according to the facts of the vehicular manslaughter case before it. (*Id.* at pp. 13-14.) However, the *Durkin* court observed that “a unanimity instruction is preferable in vehicular manslaughter cases, and given in most.” (*Id.* at p. 13.)

757. Involuntary Manslaughter: Failure to Perform
Legal Duty—Murder Not Charged

1 **The defendant is charged [in Count ____] with involuntary manslaughter**
2 **based on failure to perform a legal duty.**

3
4 **To prove that the defendant is guilty of this crime, the People must prove**
5 **that:**

6
7 **1. The defendant had a legal duty to _____** *<insert name or*
8 *description of decedent>.*

9
10 **2. The defendant failed to perform that legal duty.**

11
12 **3. The defendant's failure was criminally negligent.**

13
14 **AND**

15
16 **4. The defendant's failure caused the death of _____** *<insert*
17 *name or description of decedent>.*

18
19 **[A _____** *<insert description of person owing duty>* **has a legal duty to**
20 **(help/care for/rescue/warn/maintain the property of/ _____** *<insert other*
21 *required action[s]>)* **_____** *<insert description of decedent>.*
22

23 ***Criminal negligence* involves more than ordinary carelessness, inattention, or**
24 **mistake in judgment. A person acts with criminal negligence when:**

25
26 **1. He or she acts in a reckless way that creates a high risk of death or**
27 **great bodily injury.**

28
29 **AND**

30
31 **2. A reasonable person would have known that acting in that way**
32 **would create such a risk.**

33
34 **In other words, a person acts with criminal negligence when the way he or**
35 **she acts is so different from how an ordinarily careful person would act in the**
36 **same situation that his or her act amounts to disregard for human life or**
37 **indifference to the consequences of that act.**

38
39 [Great bodily injury means significant or substantial physical injury.]

40
41 [An act causes death if the death is the direct, natural, and probable
42 consequence of the act. A natural and probable consequence is one that a
43 reasonable and prudent person would know is likely to happen if nothing
44 unusual intervenes. In deciding whether a consequence is natural and
45 probable, consider all of the circumstances established by the evidence.]

46
47 [There may be more than one cause of death. An act causes death, only if it is
48 a substantial factor in causing the death. A substantial factor is more than a
49 trivial or remote factor. However, it does not need to be the only factor that
50 causes the death.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

Legal Duty

The existence of a legal duty is a matter of law to be decided by the judge. (*Kentucky Fried Chicken v. Superior Court* (1997) 14 Cal.4th 814, 819; *Isaacs v. Huntington Memorial Hospital* (1985) 38 Cal.3d 112, 124.) The court should instruct the jury if a legal duty exists. (See *People v. Burden* (1977) 72 Cal.App.3d 603, 614 [proper instruction that parent has legal duty to provide necessary care for a child].) In the instruction on legal duty, the court should use generic terms to describe the relationship and duty owed. For example:

A parent has a legal duty to care for a child.

A paid caretaker has a legal duty to care for the person he or she was hired to care for.

A person who has assumed responsibility for another person has a legal duty to care for that other person.

The court should not state “the defendant had a legal duty to the decedent.” (See *People v. Brown* (1988) 46 Cal.3d 432, 444–445 [correct to state “a Garden Grove Regular Police Officer [is a] peace officer”; would be error to state “Officer Reed was a peace officer”].)

However, in a small number of cases where the legal duty to act is based on the defendant having created or increased risk to the victim, the existence of the legal duty may depend on facts in dispute. (See *People v. Oliver* (1989) 210 Cal.App.3d 138, 149.) If there is a conflict in testimony over the facts necessary to establish that the defendant owed a legal duty to the victim, then the issue must be submitted to the jury. In such cases, the court should insert a section similar to the following:

The People must prove that the defendant had a legal duty to (help/rescue/warn/ _____ <insert other required action[s]> _____ <insert name of decedent>.

In order to prove that the defendant had this legal duty, the People must prove that the defendant _____ <insert facts that establish legal duty>.

If you decide that the People have proved that the defendant _____ <insert facts that establish legal duty>, then the defendant had a legal duty to (help/rescue/warn/ _____ <insert other required action[s]> _____ <insert name of decedent>.

If you have a reasonable doubt whether the defendant _____ <insert facts that establish legal duty>, then you must find (him/her) not guilty.

AUTHORITY

Elements ▶ Pen. Code, § 192(b); *People v. Oliver* (1989) 210 Cal.App.3d 138, 146.

Criminal Negligence ▶ *People v. Penny* (1955) 44 Cal.2d 861, 879–880; *People v. Rodriguez* (1960) 186 Cal.App.2d 433, 440.

Legal Duty ▶ *People v. Heitzman* (1994) 9 Cal.4th 189, 198–199; *People v. Oliver* (1989) 210 Cal.App.3d 138, 149.

Causation ▶ *People v. Roberts* (1992) 2 Cal.4th 271, 315–321.

1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against the Person, §§ 232–234, pp. 842–844.

RELATED ISSUES

Legal Duty to Aid

“A necessary element of negligence, whether criminal or civil, is a duty owed to the person injured and a breach of that duty.” (*People v. Oliver* (1989) 210

Cal.App.3d 138, 147.) “Generally, one has no legal duty to rescue or render aid to another in peril, even if the other is in danger of losing his or her life, absent a special relationship which gives rise to such duty.” (*Ibid.*)

In California civil cases, courts have found a special relationship giving rise to an affirmative duty to act where some act or omission on the part of the defendant either created or increased the risk of injury to the plaintiff, or created a dependency relationship inducing reliance or preventing assistance from others. . . . Where, however, the defendant took no affirmative action which contributed to, increased, or changed the risk which would otherwise have existed, and did not voluntarily assume any responsibility to protect the person or induce a false sense of security, courts have refused to find a special relationship giving rise to a duty to act. (*Ibid.*)

Duty Based on Dependency/Voluntary Assumption of Responsibility

A legal duty to act exists when the defendant is a caretaker or has voluntarily assumed responsibility for the victim. (*Walker v. Superior Court* (1988) 47 Cal.3d 112,134–138 [parent to child]; *People v. Montecino* (1944) 66 Cal.App.2d 85, 100 [contracted caretaker to dependent].)

Duty Based on Conduct Creating or Increasing Risk

A legal duty to act may also exist where the defendant’s behavior created or substantially increased the risk of harm to the victim, either by creating the dangerous situation or by preventing others from rendering aid. (*People v. Oliver* (1989) 210 Cal.App.3d 138, 147–148 [defendant had duty to act where she drove victim to her home knowing he was drunk, knowingly allowed him to use her bathroom to ingest additional drugs, and watched him collapse on the floor]; *Sea Horse Ranch, Inc. v. Superior Court* (1994) 24 Cal.App.4th 446, 456 [defendant had duty to prevent horses from running onto adjacent freeway creating risk].)

STAFF NOTES

Use of term “Criminal Negligence” in Instruction

The statutory phrase for the state of mind involved in this prong of involuntary manslaughter is “without due caution and circumspection.” This has been held to be equivalent to “criminal negligence,” as described in *People v. Oliver* (1989) 210 Cal.App.3d 138, 146:

Criminal negligence is premised on conduct more reckless and culpable than that of "ordinary," or civil negligence. The conduct must be such a sharp departure from the conduct of an ordinarily prudent person that it evidences a disregard for human life, and raises a presumption of conscious indifference to the consequences.

The case law analyzes this variant of involuntary manslaughter in terms of traditional civil tort concepts of negligence:

We find [. . .] that the rules governing the imposition of a duty to render aid or assistance as an element of civil negligence, are applicable to the imposition of a duty in the context of criminal negligence.

(*Id.* at p. 149.)

Specifically, *People v. Oliver, supra*, cited these two rules from the Restatement Second of Torts:

Section 324 [. . .] provides in part: "One who, being under no duty to do so, takes charge of another who is helpless adequately to aid or protect himself is subject to liability to the other for any bodily harm caused to him by [. . .] the failure of the actor to exercise reasonable care to secure the safety of the other while within the actor's charge [. . .]"

Section 321 provides: "(1) If the actor does an act, and subsequently realizes or should realize that it has created an unreasonable risk of causing physical harm to another, he is under a duty to exercise reasonable care to prevent the risk from taking effect. (2) The rule stated in Subsection (1) applies even though at the time of the act the actor has no reason to believe that it will involve such a risk."

(*People v. Oliver, supra*, 210 Cal.App.3d at p. 148.)

760. Attempted Murder

1 **The defendant is charged [in Count ____] with attempted murder.**

2
3 **To prove that the defendant is guilty of attempted murder, the People must**
4 **prove that:**

5
6 **1. The defendant took [a] direct but ineffective step[s] toward killing**
7 **a person [or fetus].**

8
9 **AND**

10
11 **2. The defendant intended to kill that person [or fetus].**

12
13 ***A direct step* requires more than merely planning or preparing to commit**
14 **murder or obtaining or arranging for something needed to commit murder. A**
15 **direct step is one that goes beyond planning or preparation and shows that a**
16 **person is putting his or her plan into action. A direct step indicates a definite**
17 **and unambiguous intent to kill. It is a direct movement toward the**
18 **commission of the crime after preparations are made. It is an immediate step**
19 **that puts the plan in motion so that the plan would have been completed if**
20 **some circumstance outside the plan had not interrupted the attempt.**

21
22 **[A person who attempts to commit murder is guilty of attempted murder**
23 **even if, after taking a direct step toward killing, he or she abandons further**
24 **efforts to complete the crime, or his or her attempt fails or is interrupted by**
25 **someone or something beyond his or her control. On the other hand, if a**
26 **person freely and voluntarily abandons his or her plans before taking a direct**
27 **step toward committing the murder, then that person is not guilty of**
28 **attempted murder.]**

29
30 **[A person may intend to kill a specific victim or victims and at the same time**
31 **intend to kill anyone in a particular zone of harm or “kill zone.” In order to**
32 **convict (the/a) defendant of the attempted murder of _____ <insert**
33 **name[s] of victim[s] charged in attempted murder count[s] on concurrent-intent**
34 **theory>, the People must prove that the defendant not only intended to kill**
35 **_____ <insert name of primary target alleged> but also either intended to**
36 **kill _____ <insert name[s] of victim[s] charged in attempted murder**
37 **count[s] on concurrent-intent theory>, or intended to kill anyone within the kill**

38 **zone. If you have a reasonable doubt whether (the/a) defendant intended to**
39 **kill _____** <insert name[s] of victim[s] charged in attempted murder
40 **count[s] on concurrent-intent theory> or intended to kill _____** <insert
41 **name of primary target alleged> by harming everyone in the kill zone, then you**
42 **must find the defendant not guilty of the attempted murder of _____**
43 **<insert name[s] of victim[s] charged in attempted murder count[s] on concurrent-**
44 **intent theory>.]**
45
46 **[The defendant may be guilty of attempted murder even if you conclude that**
47 **murder was actually completed.]**

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on the elements of the crime of attempted murder when charged, or if not charged, when the evidence raises a question whether all the elements of the charged offense are present. (See *People v. Breverman* (1998) 19 Cal.4th 142, 154 [discussing duty to instruct on lesser included offenses in homicide generally].)

The penultimate bracketed paragraph is provided for cases in which the prosecution theory is that the defendant created a “kill zone,” harboring the specific and concurrent intent to kill anyone in the zone. (*People v. Bland* (2002) 28 Cal.4th 313, 331.) “The defendant may be convicted of the attempted murders of any[one] within the kill zone, although on a concurrent, not transferred intent theory.” (*Id.* at p. 331.) In such cases,

[t]he defendant has intentionally created a “kill zone” to ensure the death of his primary victim, and the trier of fact may reasonably infer from the method employed an intent to kill others concurrent with the intent to kill the primary victim.

(*Id.* at p. 330, quoting *Ford v. State* (1992) 330 Md. 682 [625 A.2d 984, 1000–1001].) The *Bland* court stated that a special instruction on this issue was not required. (*Id.* at p. 331, fn.6.) The bracketed language is provided for the court to use at its discretion.

Give the last bracketed paragraph when the defendant has been charged only with attempt to commit murder, but the evidence at trial reveals that the murder was actually completed. (See Pen. Code, § 663.)

Related Instructions

Instruction 761, Attempted Voluntary Manslaughter: Heat of Passion.

Instruction 762, Attempted Voluntary Manslaughter: Imperfect Self-Defense.

Instruction 763, Attempted Murder: Deliberation and Premeditation.

Instruction 764, Attempted Murder: Peace Officer or Firefighter.

Instructions 690–697, Defense Instructions: Defense of Self, Another, Property.

AUTHORITY

Attempt Defined ▶ Pen. Code, §§ 21a, 663, 664.

Murder Defined ▶ Pen. Code, § 187.

Express Malice/Specific Intent to Kill Required ▶ *People v. Guerra* (1985) 40 Cal.3d 377, 386.

1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Elements, §§ 53–67, pp. 262–277.

LESSER INCLUDED OFFENSES

Attempted voluntary manslaughter is a lesser included offense. (*People v. Van Ronk* (1985) 171 Cal.App.3d 818, 824–825; *People v. Williams* (1980) 102 Cal.App.3d 1018, 1024–1026.)

RELATED ISSUES

Specific Intent Required

“[T]he crime of attempted murder requires a specific intent to kill” (*People v. Guerra* (1985) 40 Cal.3d 377, 386.)

In instructing upon the crime of attempt to commit murder, there should never be any reference whatsoever to implied malice.

Nothing less than a specific intent to kill must be found before a defendant can be convicted of attempt to commit murder, and the instructions in this respect should be lean and unequivocal in explaining to the jury that only a specific intent to kill will do.

(*People v. Santascy* (1984) 153 Cal.App.3d 909, 918.)

Solicitation

Attempted solicitation of murder is a crime. (*People v. Saephanh* (2000) 80 Cal.App.4th 451, 460.)

No Attempted Involuntary Manslaughter

“[T]here is no such crime as attempted involuntary manslaughter.” (*People v. Johnson* (1996) 51 Cal.App.4th 1329, 1332.)

Transferred and Concurrent Intent

“[T]he doctrine of transferred intent does not apply to attempted murder.” (*People v. Bland* (2002) 28 Cal.4th 313, 331.) “The defendant may be convicted of the attempted murders of any[one] within the kill zone, although on a concurrent, not transferred intent theory.” (*Id.* at p. 331.)

STAFF NOTES

This instruction is adopted from 504, “Attempt Other Than Attempted Murder.” See the Staff Notes there for the general law concerning attempt. Issues specific to attempted murder are discussed below.

Statutory Authority

Penal Code Section 21a (“Attempt to commit crime; specific intent and ineffectual act”) states:

An attempt to commit a crime consists of two elements: a specific intent to commit the crime, and a direct but ineffectual act done towards its commission.

Penal Code Section 187 (“Murder” defined) states in relevant part:

(a) Murder is the unlawful killing of a human being, or a fetus, with malice aforethought.

Penal Code Section 664 (“Attempts; Punishment”) states in relevant part:

Every person who attempts to commit any crime, but fails, or is prevented or intercepted in its perpetration, shall be punished where no provision is made by law for the punishment of those attempts

This subdivision shall apply if it is proven that a direct but ineffectual act was committed by one person toward killing another human being and the person committing the act harbored express malice aforethought, namely, a specific intent to unlawfully kill another human being. The Legislature finds and declares that this paragraph is declaratory of existing law.

Pen. Code § 663 states:

Any person may be convicted of an attempt to commit a crime, although it appears on the trial that the crime intended or attempted was perpetrated by such person in pursuance of such attempt, unless the court, in its discretion, discharges the jury and directs such person to be tried for such crime.

Concurrent Intent and Zone of Harm (“Kill Zone”)

The doctrine of *transferred* intent does not apply to attempted murder. (*People v.*

Bland (2002) 28 Cal.4th 313, 327.) The intent to kill a primary target does not transfer to a survivor. (*Id.* at p. 329.) However, the fact that a person desires to kill a particular target does not preclude finding that the person also *concurrently* intended to kill others within a “kill zone.” (*Id.*)

The *Bland* court elaborated on this concept of a “kill zone”:

The intent is concurrent when the nature and scope of the attack, while directed at a primary victim, are such that we can conclude the perpetrator intended to ensure harm to the primary victim by harming everyone in that victim’s vicinity.

(*Id.* at p. 329.)

Where the means employed to commit the crime against a primary victim creates a zone of harm around that victim, the factfinder can reasonably infer that the defendant intended that harm to all who are in the anticipated zone.

(*Id.* at p. 330.)

The term “kill zone” is used in the instructions to avoid giving the jury the impression that the defendant could be guilty of attempted murder on the surviving victims if the defendant merely intended to “harm” anyone in the zone.

The *Bland* court further notes that,

This concurrent intent theory is not a legal doctrine requiring special jury instruction such as is the doctrine of transferred intent. Rather, it is simply a reasonable inference that the jury may draw in a given case: a primary intent to kill a specific target does not rule out a concurrent intent to kill others.

(*Id.* at p. 331, n.6.)

761. Attempted Voluntary Manslaughter: Heat of Passion—Lesser Included
Offense

1 **An attempted killing that would otherwise be attempted murder is reduced to**
2 **attempted voluntary manslaughter if the defendant attempted to kill someone**
3 **because of a sudden quarrel or in the heat of passion.**

4
5 **The defendant attempted to kill someone because of a sudden quarrel or in**
6 **the heat of passion if:**

7
8 **1. The defendant took [a] direct but ineffective step[s] toward killing a**
9 **person.**

10
11 **2. The defendant intended to kill that person.**

12
13 **3. The defendant attempted the killing because (he/she) was provoked.**

14
15 **4. The provocation would have caused an ordinary and reasonable**
16 **person of average disposition to act rashly and without due**
17 **deliberation, that is, from passion rather than from judgment.**

18
19 **AND**

20
21 **5. The attempted killing was a rash act done under the influence of**
22 **intense emotion that obscured the defendant's reasoning or**
23 **judgment.**

24
25 **Heat of passion does not require anger or rage. It can be any violent or**
26 **intense emotion that causes a person to act without due deliberation and**
27 **reflection.**

28
29 **In order for heat of passion to reduce an attempted murder to attempted**
30 **voluntary manslaughter, the defendant must have acted under the direct and**
31 **immediate influence of provocation as I have defined it. While no specific**
32 **type of provocation is required, slight or remote provocation is not sufficient.**

33
34 **You must decide whether the provocation was sufficient by determining how**
35 **an ordinarily reasonable person of average disposition would react in the**
36 **same situation knowing the same facts. The defendant is not allowed to set up**

(his/her) own standard of conduct. It is not enough that the defendant was actually provoked. You must also decide if an ordinarily prudent person would have been provoked.

[If enough time passed between the provocation and the killing for an ordinarily reasonable person of average disposition to “cool off” and regain his or her clear reasoning and judgment, then the murder is not reduced to voluntary manslaughter on this basis.]

The provocation may have occurred over a short or long period of time.

The People must prove that the defendant did not attempt to kill as the result of a sudden quarrel or in the heat of passion. If you have a reasonable doubt about whether the defendant attempted to kill because of a sudden quarrel or in the heat of passion, you must find the defendant not guilty of attempted murder.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on attempted voluntary manslaughter on either theory, heat of passion or imperfect self-defense, when evidence of either is “substantial enough to merit consideration” by the jury. (*See People v. Breverman* (1998) 19 Cal.4th 142, 153–163 [discussing charge of completed murder]; *People v. Barton* (1995) 12 Cal.4th 186, 201 [same].)

The court has a **sua sponte** duty to give the *Dewberry* instruction in the last paragraph. (*People v. Dewberry* (1959) 51 Cal.2d 548, 555; *People v. Crone* (1997) 54 Cal.App.4th 71, 78.)

Related Instructions

Instruction 707, Excusable Homicide: Heat of Passion.

Instruction 750, Voluntary Manslaughter: Heat of Passion.

Instruction 762, Attempted Voluntary Manslaughter: Imperfect Self-Defense—
Lesser Included Offense.

AUTHORITY

Attempt Defined ▶ Pen. Code, §§ 21a, 664.

Manslaughter Defined ▶ Pen. Code, § 192.

Attempted Voluntary Manslaughter ▶ *People v. Van Ronk* (1985) 171 Cal.App.3d 818, 824–825; *People v. Williams* (1980) 102 Cal.App.3d 1018, 1024–1026.

1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against the Person, § 208.

RELATED ISSUES

Specific Intent to Kill Required

An attempt to commit a crime requires an intention to commit the crime and an overt act towards its completion. Where a person intends to kill another person and makes an unsuccessful attempt to do so, his intention may be accompanied by any of the aggravating or mitigating circumstances which can accompany the completed crimes. In other words, the intent to kill may have been formed after premeditation or deliberation, it may have been formed upon a sudden explosion of violence, or it may have been brought about by a heat of passion or an unreasonable but good faith belief in the necessity of self-defense.

(*People v. Van Ronk* (1985) 171 Cal.App.3d 818, 824 [citations omitted].)

No Attempted Involuntary Manslaughter

There is no crime of attempted *involuntary* manslaughter. (*People v. Johnson* (1996) 51 Cal.App.4th 1329, 1332.)

Heat of Passion: Sufficiency of Provocation—Examples

In *People v. Breverman*, sufficient evidence of provocation existed where a mob of young men trespassed onto defendant's yard and attacked defendant's car with weapons. (*People v. Breverman* (1998) 19 Cal.4th 142, 163–164.) Provocation has also been found sufficient based on the murder of a family member (*People v. Brooks* (1986) 185 Cal.App.3d 687, 694), a sudden and violent quarrel (*People v. Elmore* (1914) 167 Cal. 205, 211), and the infidelity of a wife (*People v. Berry* (1976) 18 Cal.3d 509, 515) or lover (*People v. Borchers* (1958) 50 Cal.2d 321, 328–329).

In the following cases, provocation has been found inadequate as a matter of law: evidence of name calling, smirking, or staring and looking stone-faced (*People v. Lucas* (1997) 55 Cal.App.4th 721, 739); insulting words or gestures (*People v.*

Odell David Dixon (1961) 192 Cal.App.2d 88, 91); refusing to have sex in exchange for drugs (*People v. Michael Sims Dixon* (1995) 32 Cal.App.4th 1547, 1555); a victim's resistance against a rape attempt (*People v. Rich* (1988) 45 Cal.3d 1036, 1112); and the desire for revenge (*People v. Fenenbock* (1996) 46 Cal.App.4th 1688, 1704). In addition the court has suggested that mere vandalism to an automobile is insufficient for provocation. (See *People v. Breverman* (1998) 19 Cal.4th 142, 164, fn. 11; *In re Christian S.* (1994) 7 Cal.4th 768, 779, fn. 3.)

Heat of Passion: Types of Provocation

Heat of passion does not require anger or rage. It can be "any violent, intense, high-wrought or enthusiastic emotion." (*People v. Breverman* (1998) 19 Cal.4th 142, 163–164.)

Heat of Passion: Defendant's Own Standard

Unrestrained and unprovoked rage does not constitute heat of passion, and a person of extremely violent temperament cannot substitute his or her own subjective standard for heat of passion. (*People v. Valentine* (1946) 28 Cal.2d 121, 139 [court approved admonishing jury on this point]; *People v. Danielly* (1949) 33 Cal.2d 362, 377; *People v. Berry* (1976) 18 Cal.3d 509, 515.) The objective element of this form of voluntary manslaughter is not satisfied by evidence of a defendant's "extraordinary character and environmental deficiencies." (*People v. Steele* (2002) 27 Cal.4th 1230, 1253 [evidence of intoxication, mental deficiencies, and psychological dysfunction due to traumatic experiences in Vietnam are not provocation by the victim].)

STAFF NOTES

Statutory Authority

Penal Code Section 21a (“Attempt to commit crime; specific intent and ineffectual act”) states:

An attempt to commit a crime consists of two elements: a specific intent to commit the crime, and a direct but ineffectual act done towards its commission.

Penal Code Section 192 (“Manslaughter”) states in relevant part:

Manslaughter is the unlawful killing of a human being without malice.

Penal Code Section 664 (“Attempts; Punishment) states in relevant part:

Every person who attempts to commit any crime, but fails, or is prevented or intercepted in its perpetration, shall be punished where no provision is made by law for the punishment of those attempts . [. . .]

This subdivision shall apply if it is proven that a direct but ineffectual act was committed by one person toward killing another human being and the person committing the act harbored express malice aforethought, namely, a specific intent to unlawfully kill another human being. The Legislature finds and declares that this paragraph is declaratory of existing law.

***Dewberry* Instruction**

“[W]hen the evidence is sufficient to support a finding of guilt of both the offense charged and a lesser included offense, the jury must be instructed that if they entertain a reasonable doubt as to which offense has been committed, they must find the defendant guilty only of the lesser offense.” (*People v. Dewberry* (1959) 51 Cal.2d 548, 555.) A *Dewberry* instruction is required whether the lesser-included offense is charged or uncharged. (*People v. Crone* (1997) 54 Cal.App.4th 71, 78.) For any case involving a lesser included offense, the trial court has a duty to give a *Dewberry* instruction sua sponte. (*Id.* at p. 76.)

762. Attempted Voluntary Manslaughter: Imperfect Self-Defense—Lesser
Included Offense

1 **An attempted killing that would otherwise be attempted murder is reduced**
2 **to attempted voluntary manslaughter if the defendant attempted to kill a**
3 **person because (he/she) acted in imperfect self-defense.**
4

5 **If you conclude the defendant acted in complete self-defense, (his/her)**
6 **action was lawful and you must find (him/her) not guilty of any crime.**
7 **The difference between complete self-defense and imperfect self-**
8 **defense depends on whether the defendant's belief in the need to use**
9 **deadly force was reasonable.**
10

11 **The defendant acted in imperfect self-defense if:**
12

- 13 **1. The defendant took [a] direct but ineffective step[s] toward killing a**
14 **person.**
15
- 16 **2. The defendant intended to kill when he/she acted.**
17
- 18 **3. The defendant believed that (he/she/_____ <insert name of**
19 **third party>) was being threatened with death or great bodily**
20 **injury.**
21
- 22 **4. The defendant believed (he/she/the other person) would be harmed**
23 **immediately.**
24
- 25 **5. The defendant believed that the use of deadly force was necessary to**
26 **defend against the threat.**
27

28 **AND**
29

- 30 **6. The defendant's beliefs were unreasonable.**
31

32 **[Great bodily injury means significant or substantial physical injury.]**
33

34 **Belief in future harm is not sufficient, no matter how great or how likely the**
35 **harm is believed to be. The defendant must have believed there was**
36 **immediate danger of violence to (himself/herself/someone else).**
37

38 In evaluating the defendant’s beliefs, consider all the circumstances as they
39 were known and appeared to the defendant.
40
41 The People have the burden of proving beyond a reasonable doubt that the
42 defendant was not acting in imperfect self-defense. If the People have not met
43 this burden, you must find the defendant not guilty of attempted murder.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on attempted voluntary manslaughter on either theory, heat of passion or imperfect self-defense, when evidence of either is “substantial enough to merit consideration” by the jury. (See *People v. Breverman* (1998) 19 Cal.4th 142, 153–163 [discussing charge of completed murder]; *People v. Barton* (1995) 12 Cal.4th 186, 201 [same].)

Perfect Self-Defense

Most courts hold that an instruction on imperfect self-defense **is required** in every case in which a court instructs on perfect self-defense. If there is substantial evidence of a defendant’s belief in the need for self-defense, there will *always* be substantial evidence to support an imperfect self-defense instruction because the reasonableness of that belief will always be at issue. (See *People v. Ceja* (1994) 26 Cal.App.4th 78, 85–86 [overruled in part in *People v. Blakely* (2000) 23 Cal.4th 82, 91]; see also *People v. DeLeon* (1997) 10 Cal.App.4th 815, 824.) The court in *People v. Rodriguez* disagreed, however, and found that an imperfect self-defense instruction was not necessary when the defendant’s version of the crime “could only lead to an acquittal based on justifiable homicide,” and when the prosecutor’s version of the crime could only lead to a conviction of first degree murder. (*People v. Rodriguez* (1997) 53 Cal.App.4th 1250, 1275; see also *People v. Williams* (1992) 4 Cal.4th 354, 362 [in a rape prosecution, the court was not required to give a mistake-of-fact instruction where the two sides gave wholly divergent accounts with no middle ground to support a mistake-of-fact instruction].)

Related Instructions

Instructions 690–697, Defense Instructions: Defense of Self, Another, Property.
Instruction 751, Voluntary Manslaughter: Imperfect Self-Defense.
Instruction 761, Attempted Voluntary Manslaughter: Heat of Passion—Lesser
Included Offense.

AUTHORITY

Attempt Defined ▶ Pen. Code, §§ 21a, 664.

Manslaughter Defined ▶ Pen. Code, § 192.

Attempted Voluntary Manslaughter ▶ *People v. Van Ronk* (1985) 171 Cal.App.3d 818, 824–825; *People v. Williams* (1980) 102 Cal.App.3d 1018, 1024–1026.

Imperfect Self-Defense Defined ▶ *People v. Flannel* (1979) 25 Cal.3d 668, 680–683; *People v. Barton* (1995) 12 Cal.4th 186, 201; *In re Christian S.* (1994) 7 Cal.4th 768, 773; see *People v. Uriarte* (1990) 223 Cal.App.3d 192, 197–198 [insufficient evidence to support defense of another person].

1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against the Person, § 208.

RELATED ISSUES

Specific Intent to Kill Required

An attempt to commit a crime requires an intention to commit the crime and an overt act towards its completion. Where a person intends to kill another person and makes an unsuccessful attempt to do so, his intention may be accompanied by any of the aggravating or mitigating circumstances which can accompany the completed crimes. In other words, the intent to kill may have been formed after premeditation or deliberation, it may have been formed upon a sudden explosion of violence, or it may have been brought about by a heat of passion or an unreasonable but good faith belief in the necessity of self-defense.

(*People v. Van Ronk* (1985) 171 Cal.App.3d 818, 824 [citations omitted].)

No Attempted Involuntary Manslaughter

There is no crime of attempted *involuntary* manslaughter. (*People v. Johnson* (1996) 51 Cal.App.4th 1329, 1332.)

Battered Woman's Syndrome

Evidence relating to battered woman's syndrome may be considered by the jury when deciding if the defendant actually feared the batterer and if that fear was reasonable. (See *People v. Humphrey* (1996) 13 Cal.4th 1073, 1082–1089, disapproving *People v. Aris* (1989) 215 Cal.App.3d 1178, 1189 [it was error for the court to instruct the jury that evidence of battered woman's syndrome was only relevant to the defendant's actual belief].)

Defendant Is Initial Aggressor

The initial aggressor or perpetrator of a crime may not invoke the doctrine of self-defense against the victim's legally justified acts. (See *In re Christian S.* (1994) 7 Cal.4th 768, 773, fn. 1; see also *People v. Balderas* (1985) 41 Cal.3d 144, 196.)

When Defendant Delusional—Split in Authority

In *People v. Gregory* (2002) 101 Cal.App.4th 1149, 1172, REVIEW GRANTED and DEPUBLISHED Nov. 26, 2002—S110450, the court held, that “imperfect self-defense remains a species of mistake of fact . . .; as such, it cannot be founded on delusion.” *People v. Wright* (Aug. 4, 2003, C039031) 03 C.D.O.S. 6991, 6995, REVIEW GRANTED and DEPUBLISHED Nov. 12, 2003—S119067, rejected *Gregory* and concluded that imperfect self-defense could be based on delusions.

Threats From Third Parties

The jury may consider evidence of threats against the defendant by third parties if there is evidence that the defendant associated the victim with those threats. (*People v. Minifie* (1996) 13 Cal.4th 1055, 1069 [in a self-defense case where the court also applied reasoning to imperfect self-defense].)

STAFF NOTES

Statutory Authority

Penal Code Section 21a (“Attempt to commit crime; specific intent and ineffectual act”) states:

An attempt to commit a crime consists of two elements: a specific intent to commit the crime, and a direct but ineffectual act done towards its commission.

Penal Code Section 192 (“Manslaughter”) states in relevant part:

Manslaughter is the unlawful killing of a human being without malice.

Penal Code Section 664 (“Attempts; Punishment) states in relevant part:

Every person who attempts to commit any crime, but fails, or is prevented or intercepted in its perpetration, shall be punished where no provision is made by law for the punishment of those attempts . [. . .]

This subdivision shall apply if it is proven that a direct but ineffectual act was committed by one person toward killing another human being and the person committing the act harbored express malice aforethought, namely, a specific intent to unlawfully kill another human being. The Legislature finds and declares that this paragraph is declaratory of existing law.

***Dewberry* Instruction**

“[W]hen the evidence is sufficient to support a finding of guilt of both the offense charged and a lesser included offense, the jury must be instructed that if they entertain a reasonable doubt as to which offense has been committed, they must find the defendant guilty only of the lesser offense.” (*People v. Dewberry* (1959) 51 Cal.2d 548, 555.) A *Dewberry* instruction is required whether the lesser-included offense is charged or uncharged. (*People v. Crone* (1997) 54 Cal.App.4th 71, 78.) For any case involving a lesser included offense, the trial court has a duty to give a *Dewberry* instruction sua sponte. (*Id.* at p. 76.)

763. Attempted Murder: Deliberation and Premeditation

1 **If you find the defendant guilty of attempted murder [under Count ____], you**
2 **must then determine whether the People have proved that the attempted**
3 **murder was done willfully, and with deliberation and premeditation.**

4
5 **(The defendant/_____ <insert name or description of principal if not**
6 **defendant>) committed the act willfully if (he/she) intended to kill. (The**
7 **defendant/_____ <insert name or description of principal if not**
8 **defendant>) deliberated and premeditated if, before acting, (he/she) carefully**
9 **weighed the considerations for and against (his/her) choice and, knowing the**
10 **consequences, decided to kill.**

11
12 **[The attempted murder was done willfully and with deliberation and**
13 **premeditation if either the defendant or _____ <insert name or**
14 **description of principal> or both of them acted with that state of mind.]**

15
16 **The length of time the person spends considering whether to kill does not**
17 **alone determine whether the killing is deliberate and premeditated. The**
18 **amount of time required for deliberation and premeditation may vary from**
19 **person to person and according to the circumstances. A decision to kill made**
20 **rashly, impulsively, or without careful consideration of the choice and its**
21 **consequences is not deliberate and premeditated. On the other hand, a cold,**
22 **calculated decision to kill can be reached quickly. The test is the extent of the**
23 **reflection, not the length of time.**

24
25 **The People have the burden of proving beyond a reasonable doubt that the**
26 **attempted murder was willful, deliberate, and premeditated. If the People**
27 **have not met this burden, you must find this allegation has not been proved.**

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the sentencing enhancement. (See *People v. Marshall* (2000) 83 Cal.App.4th 186, 193–195 [applying *Apprendi* to firearm use enhancement]; *Apprendi v. New Jersey* (2000) 530 U.S. 466, 475–476, 490 [any fact, other than prior conviction, that increases the maximum penalty for a crime must be charged, submitted to a jury, and proved beyond a reasonable doubt]; see also Pen. Code, § 664(a) [allegation must be charged in the accusatory pleading and admitted by defendant]

or found true by trier of fact].) Give this instruction with Instruction 760, Attempted Murder, when deliberation and premeditation is charged.

AUTHORITY

Willful, Deliberate, and Premeditated Murder ▶ Pen. Code, § 189.
Willful, Deliberate, and Premeditated Attempted Murder ▶ Pen. Code, § 664(a).
Sentence Enhancement ▶ *People v. Bright* (1996) 12 Cal.4th 652, 656–657.
Premeditation and Deliberation Defined ▶ *People v. Anderson* (1968) 70 Cal.2d 15, 26–27; *People v. Bender* (1945) 27 Cal.2d 164, 183–184; *People v. Daugherty* (1953) 40 Cal.2d 876, 901–902.

1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Elements, §§ 53–67, pp. 262–277.

RELATED ISSUES

Accomplice Liability

An aider and abettor is subject to this penalty provision where the principal attempted a willful, deliberate, and premeditated murder even though the accomplice did not personally deliberate or premeditate. (*People v. Lee* (2003) 31 Cal.4th 613, 622–623; *People v. Laster* (1997) 52 Cal.App.4th 1450, 1473.) The accomplice must still share the intent to kill. (*People v. Lee, supra*, 31 Cal.4th at pp. 623–624.)

Sentencing Enhancement

Penal Code section 664(a) (which imposes a greater punishment for attempted murder that is willful, deliberate, and premeditated) is a sentencing enhancement, and does not create a greater degree of attempted murder. (*People v. Bright* (1996) 12 Cal.4th 652, 656–657; but see *Jones v. Smith* (9th Cir. 2001) 231 F.3d 1227, 1236 [questioning the continuing validity of *Bright* in light of *Apprendi v. New Jersey* (2000) 530 U.S. 466].)

Premeditation and Deliberation—Anderson Factors

Evidence in any combination from the following categories suggests premeditation and deliberation: (1) events before the murder that indicate planning; (2) motive, specifically evidence of a relationship between the victim and the defendant; and (3) a method of killing that is particular and exacting and evinces a preconceived design to kill. (*People v. Anderson* (1968) 70 Cal.2d 15, 26–27.) Although these categories have been relied on to decide whether premeditation and deliberation are present, an instruction that suggests that each of these factors *must* be found in order to find deliberation and premeditation is not proper. (*People v. Lucero* (1988) 44 Cal.3d 1006, 1020–1021.) *Anderson* also

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noted that the brutality of the killing alone is not sufficient to support a finding that the killer acted with premeditation and deliberation. For example, the infliction of multiple acts of violence on the victim without any other evidence indicating premeditation will not support a first degree murder conviction. (*People v. Anderson, supra*, 70 Cal.2d at pp. 24–25.)

Premeditation and Deliberation—Heat of Passion Provocation

Provocation may reduce murder from first to second degree. (*People v. Thomas* (1945) 25 Cal.2d 880, 903 [provocation raised reasonable doubt about the idea of premeditation or deliberation, “leaving the homicide as murder of the second degree; i.e., an unlawful killing perpetrated with malice aforethought but without premeditation and deliberation”]; see *People v. Padilla* (2002) 103 Cal.App.4th 675, 679 [evidence of hallucination is admissible to negate deliberation and premeditation, reducing first degree murder to second degree murder].) The court, on request, should instruct on provocation if there is sufficient evidence to support such an instruction.

STAFF NOTES

Statutory Authority

All murder which is perpetrated by means of . . . any other kind of willful, deliberate, and premeditated killing . . . is murder of the first degree.” (Penal Code, § 189.)

“[I]f the crime attempted is willful, deliberate, and premeditated murder, as defined in section 189, the person guilty of that attempt shall be punished by imprisonment in the state prison for life with the possibility of parole.” (Penal Code, § 664(a).)

Willful, Deliberate and Premeditated

[F]irst degree murder is distinguished from second degree murder by the presence or absence of premeditation and deliberation.

Premeditation and deliberation are not to be confused with a deliberate intent to kill. Premeditation and deliberation require substantially more reflection; i.e., more understanding and comprehension of the character of the act than the mere amount of thought necessary to form the intention to kill. It is therefore obvious that the mere intent to kill is not the equivalent of a deliberate and premeditated intent to kill. Consequently, an intentional killing is not first degree murder unless the intent to kill was formed upon a preexisting reflection and was the subject of actual deliberation and forethought.

(*People v. Van Ronk* (1985) 171 Cal.App.3d 818, 822-23 [citations, quotation marks and footnote omitted].)

Accomplice Liability

In the recently issued opinion of *People v. Lee* (2003) 2003 DJDAR 9124, 9128, the Supreme Court held that Penal Code section 664(a) *does not* require an aider and abettor to personally premeditate and deliberate. Rather, the court concluded, the penalty enhancement applies to one convicted of attempted murder as an aider and abettor if the principal premeditated and deliberated. (*Ibid.*) In reaching this holding, the court reasoned as follows:

To begin with, as a substantive matter section 664(a) requires only that the *murder attempted* was willful, deliberate, and premeditated for an attempted murderer to be punished with life imprisonment. To quote the language of section 664(a), "if the crime attempted is willful, deliberate, and premeditated murder ..., the person guilty of

that attempt shall be punished by imprisonment ... for life" Thus, section 664(a) states *only* that the murder attempted must have been willful, deliberate, and premeditated, *not* that the attempted murderer *personally* must have acted willfully and with deliberation and premeditation. Put otherwise, section 664(a) states that if the murder attempted was willful, deliberate, and premeditated, any "person *guilty of that attempt*"--*not* confined to persons *who acted willfully and with deliberation and premeditation*--"shall be punished by imprisonment ... for life." Of course, a person may be guilty of attempted murder or indeed of any crime, on varying bases and with varying mental states, depending, for example, on whether he or she was a direct perpetrator or an aider and abettor or even a conspirator.

Referring three times broadly and generally to "the person guilty" of attempted murder, section 664(a) not once distinguishes between an attempted murderer who is guilty as a direct perpetrator and an attempted murderer who is guilty as an aider and abettor, and not once requires of an attempted murderer personal willfulness, deliberation, and premeditation. Had the Legislature intended to draw a distinction between direct perpetrators and aiders and abettors, it certainly could have done so expressly.

(*People v. Lee*, *supra*, 2003 DJDAR at p. 9126 [emphasis in original].)

Dewberry Instruction

"[W]hen the evidence is sufficient to support a finding of guilt of both the offense charged and a lesser included offense, the jury must be instructed that if they entertain a reasonable doubt as to which offense has been committed, they must find the defendant guilty only of the lesser offense." (*People v. Dewberry* (1959) 51 Cal.2d 548, 555.) A *Dewberry* instruction is required whether the lesser-included offense is charged or uncharged. (*People v. Crone* (1997) 54 Cal.App.4th 71, 78.) For any case involving a lesser included offense, the trial court has a duty to give a *Dewberry* instruction sua sponte. (*Id.* at p. 76.)

The Supreme Court has ruled that, in the context of double jeopardy, Penal Code section 664(a) is a sentencing enhancement rather than a lesser included offense. (*People v. Bright* (1996) 12 Cal.4th 652, 656-657.) However, the Ninth Circuit Court of Appeals has questioned the continuing validity of this ruling in light of *Apprendi v. New Jersey* (2000) 530 U.S. 466. (*Jones v. Smith* (9th Cir. 2001) 231 F.3d 1227, 1236.) Staff found only one unpublished opinion discussing whether, as a result of *Apprendi*, a specific *Dewberry* instruction is now required when an enhancement under Penal Code section 664(a) is charged. A *Dewberry* instruction is recommended.

764. Attempted Murder: Peace Officer or Firefighter

1 **If you find the defendant guilty of attempted murder [under Count ____], you**
2 **must then determine whether the People have proved that (he/she) attempted**
3 **to murder a (peace officer/firefighter).**

4
5 **To prove this additional allegation, the People must prove that:**

- 6
7 **1. _____** *<insert officer's name, excluding title>* **was a (peace**
8 **officer/firefighter) lawfully performing the duties of (a/an)**
9 **_____** *<insert title of peace officer specified in Pen. Code, § 830*
10 *et seq. or firefighter>.*

11
12 **AND**

- 13
14 **2. When the defendant attempted the murder, the defendant knew, or**
15 **reasonably should have known, that _____** *<insert officer's*
16 *name, excluding title>* **was a (peace officer/firefighter) who was**
17 **performing (his/her) duties.**

18
19 **[A sworn member of _____** *<insert name of agency that employs peace*
20 *officer>, authorized by _____* *<insert appropriate section from Pen. Code,*
21 *§ 830 et seq.> to _____* *<describe statutory authority>, is a peace officer.]*

22
23 **The duties of a _____** *<insert title of peace officer specified in Pen. Code,*
24 *§ 830 et seq. or firefighter> include _____* *<insert job duties>.*

25
26 **[A peace officer is not lawfully performing his or her duties if he or she is**
27 **(unlawfully arresting or detaining someone/ [or] using unreasonable or**
28 **excessive force when (making/attempting to make) an otherwise lawful arrest**
29 **or detention).]** *<Give one or more of the following bracketed paragraphs defining*
30 *lawfulness of officer's conduct if these instructions are not already given to the*
31 *jury in the instructions for a greater offense. If the instructions have already been*
32 *given, use the first bracketed paragraph below. Give the final paragraph in every*
33 *case.>*

34
35 *<Instruction Already Given>*

36 **[Instruction _____** *<insert instruction number>* **explains when an officer is**
37 **(unlawfully arresting or detaining someone/ [or] using unreasonable or**
38 **excessive force when (making/attempting to make) an otherwise lawful arrest**
39 **or detention).]**

40
41 <A. Unlawful Detention>

42 [A peace officer may legally detain someone if:

- 43
44 1. He or she knows specific facts that lead him or her to suspect that
45 the person to be detained has been, is, or is about to be involved in
46 activity relating to crime.

47
48 AND

- 49
50 2. A reasonable officer who knew the same facts would have the same
51 suspicion.

52
53 Any other detention is unlawful.

54
55 In deciding whether the detention was unlawful, consider evidence of the
56 officer's training and experience and all the circumstances known by the
57 officer when he or she detained the person.]

58
59 <B. Unlawful Arrest>

60 [A peace officer may legally arrest someone [either] (on the basis of an arrest
61 warrant/ [or] if he or she has probable cause to make the arrest).

62
63 Any other arrest is unlawful.

64
65 An officer has *probable cause* to arrest when he or she knows facts that would
66 lead a person of ordinary care and prudence to honestly and strongly suspect
67 that the person to be arrested is guilty of a crime.

68
69 [In order for an officer to lawfully arrest someone without a warrant for a
70 misdemeanor or infraction, the officer must have probable cause to believe
71 that the person to be arrested committed a misdemeanor or infraction in the
72 officer's presence.]

73
74 [[On the other hand,] (In/in) order for an officer to lawfully arrest someone
75 for a (felony/ [or] _____ <insert misdemeanor not requiring commission in
76 officer's presence; see Bench Notes>) without a warrant, that officer must have
77 probable cause to believe the person to be arrested committed a (felony/ [or]
78 _____ <insert misdemeanor not requiring commission in officer's presence;
79 see Bench Notes>). However, it is not required that the offense be committed
80 in the officer's presence.]

_____ <insert crime that was basis for arrest> is a
(felony/misdemeanor/infraction).

[In order for an officer to enter a home without a warrant to arrest someone:

1. The officer must have probable cause to believe that the person to be arrested committed a crime.

AND

2. Exigent circumstances require the officer to enter the home without a warrant.

The term *exigent circumstances* describes an emergency situation that requires swift action to prevent (1) imminent danger to life or serious damage to property, or (2) the imminent escape of a suspect or destruction of evidence.]

[The officer must tell that person that the officer intends to arrest him or her, why the arrest is being made, and the authority for the arrest.] [The officer does not have to tell the arrested person these things if the officer has probable cause to believe that the person is committing or attempting to commit a crime, is fleeing from the commission of a crime, or has escaped from custody.] [The officer must also tell the arrested person the offense for which (he/she) is being arrested if (he/she) asks for that information.]]

<C. Use of Force>

[Special rules control the use of force.

A peace officer may use reasonable force to arrest or detain someone, to prevent escape, to overcome resistance, or in self-defense.

If a person knows, or reasonably should know, that a peace officer is arresting or detaining him or her, the person must not use force or any weapon to resist an officer's use of reasonable force.

If a peace officer uses unreasonable or excessive force while (arresting/attempting to arrest/detaining/attempting to detain) a person, that person may lawfully use reasonable force to defend (himself/herself).

A person being arrested uses *reasonable force* when he or she uses that degree of force that he or she actually believes is reasonably necessary to protect himself or herself from the officer's use of unreasonable or excessive force.

125 **The force must be no more than that which a reasonable person in the same**
126 **situation would believe is necessary for his or her protection.**

127
128 **[If you find the defendant used reasonable force in response to the officer's**
129 **use of excessive force, you must find the defendant not guilty of this**
130 **additional allegation.]]**

131
132 *<GIVE IN EVERY CASE.>*

133 **The People have the burden of proving beyond a reasonable doubt that the**
134 **defendant attempted to murder a (peace officer/firefighter). If the People**
135 **have not met this burden, you must find this additional allegation has not**
136 **been proved.**

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the sentencing enhancement. (See *People v. Marshall* (2000) 83 Cal.App.4th 186, 193–195 [applying *Apprendi* to firearm use enhancement]; *Apprendi v. New Jersey* (2000) 530 U.S. 466, 475–476, 490 [any fact, other than prior conviction, that increases the maximum penalty for a crime must be charged, submitted to a jury, and proved beyond a reasonable doubt].)

The court has a **sua sponte** duty to instruct on defendant's reliance on self-defense as it relates to the use of excessive force. (*People v. White* (1980) 101 Cal.App.3d 161, 167–168.) On request, the court must instruct that the People have the burden of proving the lawfulness of the arrest beyond a reasonable doubt. (*People v. Castain* (1981) 122 Cal.App.3d 138, 145.) If excessive force is an issue, the court has a **sua sponte** duty to instruct the jury that the defendant is not guilty of the offense charged, or any lesser included offense in which lawful performance is an element, if the defendant used reasonable force in response to excessive force. (*People v. Olguin* (1981) 119 Cal.App.3d 39, 46–47.)

Give the appropriate bracketed paragraphs on the lawfulness of the officer's conduct and use of force if those instructions have not already been given in the instructions for a greater offense. If the instructions have been given, use the bracketed paragraph directing the jury to that other instruction.

In the paragraphs headed "A. Unlawful Detention," if the case presents a factual issue of whether the defendant was in fact detained, the court should provide the jury with a definition of when a person is legally detained.

In the paragraphs headed “B. Unlawful Arrest,” several options are given depending on the crime for which the arrest was made. The general rule is that an officer may not make an arrest for a misdemeanor or infraction unless the offense was committed in the officer’s presence. (See Pen. Code, § 836(a)(1).) Statutes provide exceptions to this requirement for some misdemeanors. (See, e.g., Pen. Code, § 836(c) [violation of domestic violence protective or restraining order]; Veh. Code, § 40300.5 [driving under the influence plus traffic accident or other specified circumstance].) If the defense does not rely on the statutory limitation, neither bracketed paragraph regarding arrest without a warrant need be given. If the only offense on which the officer relied in making the arrest is a nonexempted misdemeanor or an infraction, give the first bracketed paragraph beginning “In order for an officer to lawfully arrest someone without a warrant” If the officer allegedly made the arrest for both a misdemeanor or infraction *and* a felony or exempted misdemeanor, give both bracketed paragraphs.

Give the bracketed language about entering a home under exigent circumstances if the arrest took place in the defendant’s home. (*People v. Wilkins* (1993) 14 Cal.App.4th 761, 777.)

Penal Code section 664(e) refers to the definition of peace officer used in Penal Code section 190.2(a)(7), which defines “peace officer” as “defined in Section 830.1, 830.2, 830.3, 830.31, 830.32, 830.33, 830.34, 830.35, 830.36, 830.37, 830.4, 830.5, 830.6, 830.10, 830.11, or 830.12.”

The jury must determine whether the victim is a peace officer. (*People v. Brown* (1988) 46 Cal.3d 432, 444–445.) The court may instruct the jury on the appropriate definition of “peace officer” from the statute (e.g., “a Garden Grove Regular Police Officer and a Garden Grove Reserve Police Officer are peace officers”). (*Ibid.*) However, the court may not instruct the jury that the victim was a peace officer as a matter of law (e.g., “Officer Reed was a peace officer”). (*Ibid.*)

Penal Code section 664(e) refers to the definition of firefighter used in Penal Code section 190.2(a)(9), which defines “firefighter” “as defined in Section 245.1.”

AUTHORITY

Attempted Murder on a Peace Officer or Firefighter ► Pen. Code, § 664(e).

3 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Punish, § 241.

STAFF NOTES

Statutory Authority

Notwithstanding subdivision (a), if attempted murder is committed upon a peace officer or firefighter, as those terms are defined in paragraphs (7) and (9) of subdivision (a) of Section 190.2, and the person who commits the offense knows or reasonably should know that the victim is such a peace officer or firefighter engaged in the performance of his or her duties, the person guilty of the attempt shall be punished by imprisonment in the state prison for life with the possibility of parole.

(Penal Code, § 664(e).)

“Peace Officer”:

Pen. Code section 190.2(a)(7) defines a peace officer as “defined in Section 830.1, 830.2, 830.3, 830.31, 830.32, 830.33, 830.34, 830.35, 830.36, 830.37, 830.4, 830.5, 830.6, 830.10, 830.11, or 830.12 . . .” This includes a wide range of public employees from every level of government.

“Firefighter”:

Pen. Code section 190.2(a)(9) defines firefighter “as defined in Section 245.1,” which states,

“fireman” or “firefighter” includes any person who is an officer, employee or member of a fire department or fire protection or firefighting agency of the federal government, the State of California, a city, county, city and county, district, or other public or municipal corporation or political subdivision of this state, whether this person is a volunteer or partly paid or fully paid.

Structure of Instruction

This instruction is based on Instruction 859, Battery Against Peace Officer.

Performance of Duties Requires Lawful Conduct

California cases hold that although the court, not the jury, usually decides whether police action was supported by legal cause, disputed facts bearing on the issue of legal cause must be submitted to the jury considering an engaged-in-duty element, since the lawfulness of the victim's conduct forms part of the corpus delicti of the offense.

(*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1217 [footnote omitted].)

Burden of Proof on Lawful Performance of Duties

The People have the burden of proving the lawfulness of the arrest beyond a reasonable doubt and the court must so instruct on request. (*People v. Castain* 1981) 122 Cal.App.3d 138, 145.) It is never within the scope of an officer's duties to make an unlawful arrest. (*People v. Curtis* (1969) 70 Cal.2d 347, 354.)

Dewberry Instruction

“[W]hen the evidence is sufficient to support a finding of guilt of both the offense charged and a lesser included offense, the jury must be instructed that if they entertain a reasonable doubt as to which offense has been committed, they must find the defendant guilty only of the lesser offense.” (*People v. Dewberry* (1959) 51 Cal.2d 548, 555.) A *Dewberry* instruction is required whether the lesser-included offense is charged or uncharged. (*People v. Crone* (1997) 54 Cal.App.4th 71, 78.) For any case involving a lesser included offense, the trial court has a duty to give a *Dewberry* instruction sua sponte. (*Id.* at p. 76.)

Penal Code section 664(e), the statute at issue here, is a sentencing enhancement akin to Penal Code section 664(a) (attempted murder with deliberation and premeditation). The Supreme Court has ruled that, in the context of double jeopardy, Penal Code section 664(a) is a sentencing enhancement, *not* a lesser included offense. (*People v. Bright* (1996) 12 Cal.4th 652, 656-657.) However, the Ninth Circuit Court of Appeals has questioned the continuing validity of this ruling in light of *Apprendi v. New Jersey* (2000) 530 U.S. 466. (*Jones v. Smith* (9th Cir. 2001) 231 F.3d 1227, 1236.) Based on the rationale of *Apprendi*, a *Dewberry* instruction may be required in a case charging Penal Code section 664(e). A *Dewberry* instruction is provided for the court to use at its discretion but would be recommended given the uncertainty.

770. Gross Vehicular Manslaughter While Intoxicated

The defendant is charged [in Count ____] with gross vehicular manslaughter while intoxicated.

To prove that the defendant is guilty of this crime, the People must prove that:

- 1. The defendant (drove under the influence of (an alcoholic beverage/ [and/or] a drug)/drove under the influence of (an alcoholic beverage/ [and/or] a drug) causing injury to another/drove under the influence of (an alcoholic beverage/ [and/or] a drug) when under the age of 21/operated a vessel under the influence of (an alcoholic beverage/ [and/or] a drug)).**
- 2. While (driving that vehicle/operating that vessel) under the influence of (an alcoholic beverage/ [and/or] a drug), the defendant also committed a (misdemeanor [or i nfraction] /[or] a lawful act that might cause death).**
- 3. The defendant committed (that/those) act[s] with gross negligence.**

AND

- 4. The defendant's grossly negligent act[s] caused the death of another person.**

[The People allege that the defendant committed the following misdemeanor[s] [or infraction[s]]: _____ <insert misdemeanor[s]/infraction[s]>. To prove that the defendant committed _____ <insert name of offense>, the People must prove that:

<LIST ELEMENTS IF THE DEFENDANT IS NOT SEPARATELY CHARGED WITH [A] COUNT[S] ALLEGING [A] SEPARATE VIOLATION[S] OF THE RELEVANT STATUTE[S].>

[The People [also] allege that the defendant committed the following act(s) that might cause death: _____ <insert act[s] alleged>.]

[To prove that the defendant (drove under the influence of (an alcoholic

39 beverage/ [and/or] a drug)/drove under the influence of (an alcoholic
40 beverage/ [and/or] a drug) causing injury to another/drove under the
41 influence of (an alcoholic beverage/ [and/or] a drug) when under the age of
42 21/operated a vessel under the influence of (an alcoholic beverage/ [and/or] a
43 drug)), the People must prove that:

44
45 <LIST ELEMENTS OF THE APPROPRIATE SECTION IF THE
46 DEFENDANT IS NOT SEPARATELY CHARGED WITH A COUNT
47 ALLEGING A SEPARATE VIOLATION OF THAT STATUTE.>]

48
49 **Gross negligence** involves more than ordinary carelessness, inattention, or
50 mistake in judgment. A person acts with gross negligence when:

- 51
52 1. He or she acts in a reckless way that creates a high risk of death or
53 great bodily injury.

54
55 **AND**

- 56
57 2. A reasonable person would have known that acting in that way
58 would create such a risk.

59
60 In other words, a person acts with gross negligence when the way he or she
61 acts is so different from the way an ordinarily careful person would act in the
62 same situation that his or her act amounts to disregard for human life or
63 indifference to the consequences of that act.

64
65 The combination of (driving a vehicle/operating a vessel) while under the
66 influence of (an alcoholic beverage/ [and/or] a drug) and violating a
67 (traffic/navigation) law is not enough by itself to establish gross negligence. In
68 evaluating whether the defendant acted with gross negligence, consider the
69 level of the defendant's intoxication, if any; the way the defendant
70 (drove/operated the vessel); and any other relevant aspects of the defendant's
71 conduct.

72
73 [*Great bodily injury* means significant or substantial physical injury.]

74
75 [The defendant is not guilty of gross vehicular manslaughter if:

- 76
77 1. There was a sudden and unexpected emergency situation in which
78 the defendant or someone else was [or appeared to be] in danger of
79 immediate injury.
80
81 2. The defendant did not cause the emergency.

82
83 **AND**
84

85 **3. The defendant acted as a reasonably careful person would have**
86 **acted in similar circumstances, even if it appears later that a**
87 **different course of action would have been safer.]**
88

89 **[An act causes death if the death is the direct, natural, and probable**
90 **consequence of the act. A *natural and probable consequence* is one that a**
91 **reasonable and prudent person would know is likely to happen if nothing**
92 **unusual intervenes. In deciding whether a consequence is natural and**
93 **probable, consider all of the circumstances established by the evidence.]**
94

95 **[There may be more than one cause of death. An act causes death only if it is**
96 **a substantial factor in causing the death. A *substantial factor* is more than a**
97 **trivial or remote factor. However, it does not need to be the only factor that**
98 **causes the death.]**
99

100 **[The People allege that the defendant committed the following**
101 **(misdemeanor[s][,]/infraction[s][,]/ [and] lawful act[s] that might cause**
102 **death): _____ <insert alleged predicate acts when multiple acts alleged>.**
103 **You may not find (the/a) defendant guilty unless all of you agree that the**
104 **People have proved that (the/a) defendant committed at least one of these**
105 **alleged acts and you all agree that the same act or acts were proved.]**
106

107 **[The People also allege that the defendant has previously been convicted of a**
108 **crime. You must determine whether the People have proved that the**
109 **defendant was convicted of: _____ <insert appropriate code conviction**
110 **from the list in Pen. Code, § 190.9(d)>.]**
111

112 **[The People have the burden of proving beyond a reasonable doubt that the**
113 **defendant committed gross vehicular manslaughter while intoxicated. If the**
114 **People have not met this burden, you must find the defendant not guilty of**
115 **that crime. You must consider whether the defendant is guilty of the lesser**
116 **crime[s] of _____ <insert lesser offense[s]>.]**

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

The court has a **sua sponte** duty to specify the predicate misdemeanor(s) or infraction(s) alleged and to instruct on the elements of the predicate offense(s). (*People v. Milham* (1984) 159 Cal.App.3d 487, 506; *People v. Ellis* (1999) 69 Cal.App.4th 1334, 1339.)

In element 1, instruct on the particular “under the influence” offense charged.

In element 2, instruct on either or both of the predicate offense(s) as appropriate.

There is a split in authority over whether there is a **sua sponte** duty to give a unanimity instruction when multiple predicate offenses are alleged. (*People v. Gary* (1987) 189 Cal.App.3d 1212, 1218 [unanimity instruction required, overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 481]; *People v. Durkin* (1988) 205 Cal.App.3d Supp. 9, 13 [unanimity instruction not required but preferable]; *People v. Mitchell* (1986) 188 Cal.App.3d 216, 222 [unanimity instruction not required]; *People v. Leffel* (1988) 203 Cal.App.3d 575, 586–587 [unanimity instruction not required, harmless error if was required].) A unanimity instruction is included in a bracketed paragraph should the court determine that such an instruction is appropriate. The jury need not specify which act or acts form the basis for their verdict.

If a sentencing enhancement is alleged under Penal Code section 191.5(d) and the defendant has not waived jury trial on the priors, then the court has a **sua sponte** duty to instruct the jury on the prior conviction(s).

If there is sufficient evidence and the defendant requests it, the court should instruct on the imminent peril/sudden emergency doctrine in the bracketed paragraph. (*People v. Boulware* (1940) 41 Cal.App.2d 268, 269–270.)

If causation is at issue, the court has a **sua sponte** duty to instruct on proximate cause. (*People v. Bernhardt* (1963) 222 Cal.App.2d 567, 590–591.) If the evidence indicates that there was only one cause of death, the court should give the “direct, natural, and probable” language in the first bracketed paragraph on causation. If there is evidence of multiple causes of death, the court should give the “substantial factor” instruction in the second bracketed paragraph on causation. (See *People v. Autry* (1995) 37 Cal.App.4th 351, 363; *People v. Pike* (1988) 197 Cal.App.3d 732, 746–747.)

AUTHORITY

Gross Vehicular Manslaughter While Intoxicated ▶ Pen. Code, § 191.5.
Unlawful Act Dangerous Under the Circumstances of Its Commission ▶ *People v. Wells* (1996) 12 Cal.4th 979, 982.

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Specifying Predicate Unlawful Act ▶ *People v. Milham* (1984) 159 Cal.App.3d 487, 506.

Elements of the Predicate Unlawful Act ▶ *People v. Ellis* (1999) 69 Cal.App.4th 1334, 1339.

Unanimity Instruction ▶ *People v. Gary* (1987) 189 Cal.App.3d 1212, 1218 [overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 481]; *People v. Durkin* (1988) 205 Cal.App.3d Supp. 9, 13; *People v. Mitchell* (1986) 188 Cal.App.3d 216, 222; *People v. Leffel* (1988) 203 Cal.App.3d 575, 586–587.

Gross Negligence ▶ *People v. Penny*, (1955) 44 Cal.2d 861, 879–880; *People v. Rodriguez* (1960) 186 Cal.App.2d 433, 440.

Gross Negligence—Overall Circumstances ▶ *People v. Bennett* (1992) 54 Cal.3d 1032, 1039.

Lesser Included Offenses ▶ *People v. Miranda* (1994) 21 Cal.App.4th 1466–1467; *People v. Verlinde* (2002) 100 Cal. App.4th 1146, 1165–1166.

Causation ▶ *People v. Rodriguez* (1960) 186 Cal.App.2d 433, 440.

Imminent Peril/Sudden Emergency Doctrine ▶ *People v. Boulware* (1940) 41 Cal.App.2d 268, 269.

1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against the Person, §§ 238–245, pp. 847–854.

LESSER INCLUDED OFFENSES

Vehicular Manslaughter With Gross Negligence Without Intoxication ▶ Pen. Code, § 192(c)(1); *People v. Miranda* (1994) 21 Cal.App.4th 1464, 1466–1467.

Vehicular Manslaughter With Ordinary Negligence While Intoxicated ▶ Pen. Code, § 192(c)(3); *People v. Verlinde* (2002) 100 Cal.App.4th 1146, 1165–1166.

Vehicular Manslaughter With Ordinary Negligence Without Intoxication ▶ Pen. Code, § 192(c)(2); *People v. Rodgers* (1949) 94 Cal.App.2d 166, 166.

Injury to Someone While Driving Under the Influence of Alcohol or Drugs ▶ Veh. Code, § 23153; *People v. Miranda* (1994) 21 Cal.App.4th 1464, 1466–1467.

Gross vehicular manslaughter while intoxicated is *not* a lesser included offense of murder. (*People v. Sanchez* (2001) 24 Cal.4th 983, 992.)

RELATED ISSUES

DUI Cannot Serve as Predicate Unlawful Act

The Vehicle Code driving under the influence offense of the first element cannot do double duty as the unlawful act misdemeanor for the second element. (*People v. Soledad* (1987) 190 Cal.App.3d 74, 81.) “[T]he trial court erroneously omitted the ‘unlawful act’ element of vehicular manslaughter when instructing in CALJIC No. 8.90.1 [the elements] by referring to Vehicle Code section 23152 rather than another ‘unlawful act’ as required by the statute.” (*Id.* at p. 82.)

Predicate Act Need Not Be Inherently Dangerous

“[T]he offense which constitutes the ‘unlawful act’ need not be an inherently dangerous misdemeanor or infraction. Rather, to be an ‘unlawful act’ within the meaning of section 192(c)(1), the offense must be dangerous under the circumstances of its commission. An unlawful act committed with gross negligence would necessarily be so.” (*People v. Wells* (1996) 12 Cal.4th 979, 982.)

Lawful Act in an Unlawful Manner: Negligence

The statute uses the phrase “lawful act which might produce death, in an unlawful manner.” (Pen. Code, § 191.5.) “[C]ommitting a lawful act in an unlawful manner simply means to commit a lawful act with negligence, that is, without reasonable caution and care.” (*People v. Thompson* (2000) 79 Cal.App.4th 40, 53.) Because the instruction lists the negligence requirement as element 3, the phrase “in an unlawful manner” is omitted from element 2 as repetitive.

STAFF NOTES

Pen. Code, § 191.5: Gross Vehicular Manslaughter While Intoxicated

(a) Gross vehicular manslaughter while intoxicated is the unlawful killing of a human being without malice aforethought, in the driving of a vehicle, where the driving was in violation of Section 23140, 23152, or 23153 of the Vehicle Code, and the killing was either the proximate result of the commission of an unlawful act, not amounting to a felony, and with gross negligence, or the proximate result of the commission of a lawful act which might produce death, in an unlawful manner, and with gross negligence.

(b) Gross vehicular manslaughter while intoxicated also includes operating a vessel in violation of subdivision (b), (c), (d), (e), or (f) of Section 655 of the Harbors and Navigation Code, and in the commission of an unlawful act, not amounting to felony, and with gross negligence; or operating a vessel in violation of subdivision (b), (c), (d), (e), or (f) of Section 655 of the Harbors and Navigation Code, and in the commission of a lawful act which might produce death, in an unlawful manner, and with gross negligence.

(c) Except as provided in subdivision (d), gross vehicular manslaughter while intoxicated is punishable by imprisonment in the state prison for 4, 6, or 10 years.

(d) Any person convicted of violating this section who has one or more prior convictions of this section or of paragraph (1) or (3) of subdivision (c) of Section 192, subdivision (a) or (c) of Section 192.5 of this code, or of violating Section 23152 punishable under Sections 23540, 23542, 23546, 23548, 23550, or 23552 of, or convicted of Section 23153 of, the Vehicle Code, shall be punished by imprisonment in the state prison for a term of 15 years to life. Article 2.5 (commencing with Section 2930) of Chapter 7 of Title 1 of Part 3 shall apply to reduce the term imposed pursuant to this subdivision.

(e) This section shall not be construed as prohibiting or precluding a charge of murder under Section 188 upon facts exhibiting wantonness and a conscious disregard for life to support a finding of implied malice, or upon facts showing malice consistent with the holding of the California Supreme Court in *People v. Watson*, 30 Cal.3d 290.

(f) This section shall not be construed as making any homicide in the driving of a vehicle or the operation of a vessel punishable which is not a proximate result of the commission of an unlawful act, not amounting to felony, or of the commission of a lawful act which might produce death, in an unlawful manner.

(g) For the penalties in subdivision (d) to apply, the existence of any fact required under subdivision (d) shall be alleged in the information or

indictment and either admitted by the defendant in open court or found to be true by the trier of fact.

DUI Statutes

Veh. Code § 23152 states, in pertinent part:

(a) It is unlawful for any person who is under the influence of any alcoholic beverage or drug, or under the combined influence of any alcoholic beverage and drug, to drive a vehicle.

(b) It is unlawful for any person who has 0.08 percent or more, by weight, of alcohol in his or her blood to drive a vehicle.

Veh. Code § 23153 states, in pertinent part:

(a) It is unlawful for any person, while under the influence of any alcoholic beverage or drug, or under the combined influence of any alcoholic beverage and drug, to drive a vehicle and concurrently do any act forbidden by law, or neglect any duty imposed by law in driving the vehicle, which act or neglect proximately causes bodily injury to any person other than the driver.

(b) It is unlawful for any person, while having 0.08 percent or more, by weight, of alcohol in his or her blood to drive a vehicle and concurrently do any act forbidden by law, or neglect any duty imposed by law in driving the vehicle, which act or neglect proximately causes bodily injury to any person other than the driver.

Veh. Code § 23140 states, in pertinent part:

It is unlawful for a person under the age of 21 years who has 0.05 percent or more, by weight, of alcohol in his or her blood to drive a vehicle.

Harb. & Nav. Code § 655 states, in pertinent part:

(b) No person shall operate any vessel or manipulate water skis, an aquaplane, or a similar device while under the influence of an alcoholic beverage, any drug, or the combined influence of an alcoholic beverage and any drug.

(c) No person shall operate any recreational vessel or manipulate any

water skis, aquaplane, or similar device if the person has an alcohol concentration of 0.08 percent or more in his or her blood.

(d) No person shall operate any vessel other than a recreational vessel if the person has an alcohol concentration of 0.04 percent or more in his or her blood.

(f) No person shall operate any vessel or manipulate water skis, an aquaplane, or a similar device while under the influence of an alcoholic beverage, any drug, or under the combined influence of an alcoholic beverage and any drug, and while so operating, do any act forbidden by law, or neglect any duty imposed by law in the use of the vessel, water skis, aquaplane, or similar device, which act or neglect proximately causes bodily injury to any person other than himself or herself.

Unlawful Act Dangerous Under The Circumstances of Its Commission

[T]he offense which constitutes the “unlawful act” need not be an inherently dangerous misdemeanor or infraction. Rather, to be an “unlawful act” within the meaning of section 192(c)(1), the offense must be dangerous under the circumstances of its commission. An unlawful act committed with gross negligence would necessarily be so.

(*People v. Wells* (1996) 12 Cal.4th 979, 982.)

Unlawful Act Not Amounting to a Felony: Misdemeanor or Infraction

In the context of vehicular manslaughter, “unlawful act, not amounting to a felony” means an infraction or misdemeanor. (*People v. Thompson* (2000) 79 Cal.App.4th 40, 53.)

The court is required to specify the predicate misdemeanor or infraction. (*People v. Milham* (1984) 159 Cal.App.3d 487, 506 [trial court erred in giving vehicular manslaughter instruction with phrase, “amounting to a misdemeanor or an infraction, as will be later defined,” without later defining the misdemeanor or infraction referred to].)

Definition of Gross/Criminal Negligence

[See Staff Notes to 740 Involuntary Manslaughter.]

Gross Negligence Based on Overall Circumstances Defendant's Conduct

The California Supreme Court held that “in future gross vehicular manslaughter cases the instruction should more precisely advise the jury that”:

The mere fact that a defendant drives a motor vehicle while under the influence of alcohol and violates a traffic law is insufficient in itself to constitute gross negligence. You must determine gross negligence from the level of the defendant's intoxication, the manner of driving, or other relevant aspects of the defendant's conduct resulting in the fatal accident.

(*People v. Bennett* (1991) 54 Cal.3d 1032, 1039.)

Imminent Peril/Sudden Emergency Doctrine

In *People v. Boulware* (1940) 41 Cal.App.2d 268, 269, it was held to be an error for the court to refuse to give the following instruction where there was evidence and the defendant requested it:

A person who, without negligence on his part, is suddenly confronted with unexpected and imminent danger, either to himself or to others, is not expected, nor required, to use the same judgment and prudence that is required of him in the exercise of ordinary care, in calmer and more deliberate moments. His duty is to exercise only the care that an ordinarily prudent person would exercise if confronted with the same unexpected danger, under the same circumstances. If at that moment he does what appears to him to be the best thing to do, and if his choice and manner of action are the same as might have been followed by any ordinarily prudent person under the same conditions, he does all the law requires of him, although, in the light of after-events, it should appear that a different course would have been better and safer

The language in the draft instruction is modeled on Task Force Civil Instruction 352, “Sudden Emergency,” which is based on the same civil tort law expressed in the *Boulware* instruction, but is expressed more concisely:

[Name of plaintiff/defendant] claims that [he/she] was not negligent because [he/she] acted with reasonable care in an emergency situation. [Name of plaintiff/defendant] was not negligent if [name of plaintiff/defendant] proves the following:

1. That there was a sudden and unexpected emergency situation in which someone was in actual or apparent danger of immediate injury;
2. That [name of plaintiff/defendant] did not cause the emergency; and

3. That [name of plaintiff/defendant] acted as a reasonably careful person would have acted in similar circumstances, even if it appears later that a different course of action would have been safer.

“Proximate Result”

The statutory language uses the term “proximate result.” The instruction does not use the term “proximate result” or its cognate “proximate cause” because the use of the term “proximate” in jury instructions has generally been disfavored as being confusing to jurors. (*People v. Roberts* (1992) 2 Cal.4th 271, 313; *Mitchell v. Gonzales* (1991) 54 Cal.3d 1041, 1050-52.) The proximate cause provision in the vehicular manslaughter statutes “seems intended merely to state the usual requirement that the act be a proximate cause of the death.” (1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against the Person § 241, pp. 849-850.) “[I]t is the death, not merely the accident itself, which must be the proximate result of the commission of the unlawful act.” (*People v. Tracy* (1962) 199 Cal.App.2d 163, 169.)

Unanimity Instruction

Authority is divided over whether a unanimity instruction must be given for vehicular manslaughter, when more than one unlawful act is presented to the jury as a possible basis of the “unlawful act” element. One court held that,

[I]n order to comply with the requirement that the crime charged be proved beyond a reasonable doubt, a defendant’s guilt as to each element must be proved beyond a reasonable doubt. Thus if the facts of a case present a situation where different acts could constitute the same element of an offense, the defendant is entitled to a unanimity instruction.

(*People v. Gary* (1987) 189 Cal.App.3d 1212, 1218 [overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 481].)

Another court held that,

[T]he unanimity instruction as to a single act need not be given where the acts proved are ‘just alternate ways of proving a necessary element of the *same offense*,’ and do not in themselves constitute separate chargeable offenses.

(*People v. Mitchell* (1986) 188 Cal.App.3d 216, 222 [quoting *People v. Kent* (1981) 125 Cal.App. 3d 2078, 213].)

People v. Durkin (1988) 205 Cal.App.3d Supp. 9, followed *Mitchell* in holding

that the “continuous crime” exception exempted the need for a unanimity instruction according to the facts of the vehicular manslaughter case before it. (*Id.* at pp. 13-14.) However, the *Durkin* court observed that “a unanimity instruction is preferable in vehicular manslaughter cases, and given in most.” (*Id.* at p. 13.)

771. Vehicular Manslaughter While Intoxicated—Ordinary Negligence

1 <If vehicular manslaughter while intoxicated is a charged offense, give option A;
2 if this instruction is being given as a lesser included offense, give option B.>

3
4 <A. Charged Offense>

5 [The defendant is charged [in Count ____] with vehicular manslaughter with
6 ordinary negligence while intoxicated.]

7
8 <B. Lesser Included Offense>

9 [Vehicular manslaughter with ordinary negligence while intoxicated is a
10 lesser crime than the charged crime of gross vehicular manslaughter while
11 intoxicated.]

12
13 To prove that the defendant is guilty of vehicular manslaughter with ordinary
14 negligence while intoxicated, the People must prove that:

- 15
16 1. The defendant (drove under the influence of (an alcoholic
17 beverage/[and/or] a drug)/drove under the influence of (an alcoholic
18 beverage/ [and/or] a drug) causing injury to another/drove under
19 the influence of (an alcoholic beverage/ [and/or] a drug) when under
20 the age of 21/operated a vessel under the influence of (an alcoholic
21 beverage/ [and/or] a drug)).
22
23 2. While (driving that vehicle/operating that vessel) under the
24 influence of (an alcoholic beverage/ [and/or] a drug), the defendant
25 also committed (a misdemeanor [or infraction] /[or] a lawful act
26 that might cause death).
27
28 3. The defendant committed (that/those) act[s] with ordinary
29 negligence.
30

31 AND

- 32
33 4. The defendant's negligent act[s] caused the death of another person.
34

35 [The People allege that the defendant committed the following
36 misdemeanor[s] [or infraction[s]]: _____ <insert
37 misdemeanor[s]/infraction[s]>. To prove that the defendant committed

_____ <insert name of offense>, the People must prove that:

<LIST ELEMENTS IF THE DEFENDANT IS NOT SEPARATELY
CHARGED WITH [A] COUNT[S] ALLEGING [A] SEPARATE
VIOLATION[S] OF THE RELEVANT STATUTE[S].>

[The People [also] allege that the defendant committed the following act(s)
that might cause death: _____ <insert act[s] alleged>.]

To prove that the defendant (drove under the influence of (an alcoholic
beverage/ [and/or] a drug)/drove under the influence of (an alcoholic
beverage/ [and/or] a drug) causing injury to another/drove under the
influence of (an alcoholic beverage/ [and/or] a drug) when under the age of
21/operated a vessel under the influence of (an alcoholic beverage/ [and/or] a
drug)), the People must prove that:

<LIST ELEMENTS OF THE APPROPRIATE SECTION IF THE
DEFENDANT IS NOT SEPARATELY CHARGED WITH A COUNT
ALLEGING A SEPARATE VIOLATION OF THAT STATUTE.>

[The difference between this offense and the charged offense of gross
vehicular manslaughter while intoxicated is the degree of negligence required.
I have already defined *gross negligence* for you.]

Ordinary negligence[, on the other hand,] is the failure to use reasonable care
to prevent reasonably foreseeable harm to [oneself or] someone else. A person
is negligent if he or she (does something that a reasonably careful person
would not do in the same situation/ [or] fails to do something that a
reasonably careful person would do in the same situation).

[The defendant is not guilty of gross vehicular manslaughter if:

1. There was a sudden and unexpected emergency situation in which
the defendant or someone else was [or appeared to be] in danger of
immediate injury.

2. The defendant did not cause the emergency.

AND

3. The defendant acted as a reasonably careful person would have
acted in similar circumstances, even if it appears later that a
different course of action would have been safer.]

81
82 [An act causes death if the death is the direct, natural, and probable
83 consequence of the act. A *natural and probable consequence* is one that a
84 reasonable and prudent person would know is likely to happen if nothing
85 unusual intervenes. In deciding whether a consequence is natural and
86 probable, consider all of the circumstances established by the evidence.]

87
88 [There may be more than one cause of death. An act causes death only if it is
89 a substantial factor in causing the death. A *substantial factor* is more than a
90 trivial or remote factor. However, it does not need to be the only factor that
91 causes the death.]

92
93 [The People allege that the defendant committed the following
94 (misdemeanor[s]/infraction[s]/ [and/or] lawful act[s] that might cause death):
95 _____ <insert alleged predicate acts when multiple acts alleged>. You
96 may not find (the/a) defendant guilty unless all of you agree that the People
97 have proved that (the/a) defendant committed at least one of these alleged
98 acts and you all agree that the same act or acts were proved.]

99
100 [The People have the burden of proving beyond a reasonable doubt that the
101 defendant committed vehicular manslaughter with ordinary negligence while
102 intoxicated. If the People have not met this burden, you must find the
103 defendant not guilty of that crime. You must consider whether the defendant
104 is guilty of the lesser crime[s] of _____ <insert lesser offense[s]>.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

The court has a **sua sponte** duty to specify the predicate misdemeanor(s) or infraction(s) alleged and to instruct on the elements of the predicate offense(s). (*People v. Milham* (1984) 159 Cal.App.3d 487, 506; *People v. Ellis* (1999) 69 Cal.App.4th 1334, 1339.)

In element 1, instruct on the particular “under the influence” offense charged.

In element 2, instruct on either or both of the predicate offense(s) as appropriate.

There is a split in authority over whether there is a **sua sponte** duty to give a unanimity instruction when multiple predicate offenses are alleged. (*People v.*

Gary (1987) 189 Cal.App.3d 1212, 1218 [unanimity instruction required, overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 481]; *People v. Durkin* (1988) 205 Cal.App.3d Supp. 9, 13 [unanimity instruction not required but preferable]; *People v. Mitchell* (1986) 188 Cal.App.3d 216, 222 [unanimity instruction not required]; *People v. Leffel* (1988) 203 Cal.App.3d 575, 586–587 [unanimity instruction not required, harmless error if was required].) A unanimity instruction is included in a bracketed paragraph should the court determine that such an instruction is appropriate. The jury need not specify which act or acts form the basis for their verdict.

In the definition of ordinary negligence, the court should use the entire phrase “harm to oneself or someone else” if the evidence shows a failure by the defendant to prevent harm to him- or herself rather than solely harm to another.

If there is sufficient evidence and the defendant requests it, the court should instruct on the imminent peril/sudden emergency doctrine in the bracketed paragraph. (*People v. Boulware* (1940) 41 Cal.App.2d 268, 269–270.)

If causation is at issue, the court has a **sua sponte** duty to instruct on proximate cause. (*People v. Bernhardt* (1963) 222 Cal.App.2d 567, 590–591.) If the evidence indicates that there was only one cause of death, the court should give the “direct, natural, and probable” language in the first bracketed paragraph on causation. If there is evidence of multiple causes of death, the court should give the “substantial factor” instruction in the second bracketed paragraph on causation. (See *People v. Autry* (1995) 37 Cal.App.4th 351, 363; *People v. Pike* (1988) 197 Cal.App.3d 732, 746–747.)

AUTHORITY

Vehicular Manslaughter While Intoxicated ▶ Pen. Code, § 192(c)(3).

Vehicular Manslaughter During Operation of a Vessel While Intoxicated ▶ Pen. Code, § 192.5(c)

Unlawful Act Dangerous Under the Circumstances of Its Commission ▶ *People v. Wells* (1996) 12 Cal.4th 979, 982.

Specifying Predicate Unlawful Act ▶ *People v. Milham* (1984) 159 Cal.App.3d 487, 506.

Elements of the Predicate Unlawful Act ▶ *People v. Ellis* (1999) 69 Cal.App.4th 1334, 1339.

Unanimity Instruction ▶ *People v. Gary* (1987) 189 Cal.App.3d 1212, 1218 [overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 481]; *People v. Durkin* (1988) 205 Cal.App.3d Supp. 9, 13; *People v. Mitchell* (1986) 188 Cal.App.3d 216, 222; *People v. Leffel* (1988) 203

Cal.App.3d 575, 586–587.
Ordinary Negligence ▶ Pen. Code, § 7, subd. 2; Rest.2d Torts, § 282.
Causation ▶ *People v. Rodriguez* (1960) 186 Cal.App.2d 433, 440.
Imminent Peril/Sudden Emergency Doctrine ▶ *People v. Boulware* (1940) 41 Cal.App.2d 268, 269.

1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against the Person, §§ 238–245, pp. 847–854.

LESSER INCLUDED OFFENSES

Vehicular Manslaughter With Ordinary Negligence Without Intoxication ▶ Pen. Code, § 192(c)(2); see *People v. Miranda* (1994) 21 Cal.App.4th 1464, 1466–1467.
Injury to Someone While Driving Under the Influence of Alcohol or Drugs ▶ Veh. Code, § 23153; *People v. Miranda* (1994) 21 Cal.App.4th 1464, 1466–1467.

RELATED ISSUES

DUI Cannot Serve as Predicate Unlawful Act

The Vehicle Code driving under the influence offense of the first element cannot do double duty as the unlawful act misdemeanor for the second element. (*People v. Soledad* (1987) 190 Cal.App.3d 74, 81.) “[T]he trial court erroneously omitted the ‘unlawful act’ element of vehicular manslaughter when instructing in CALJIC No. 8.90.1 [the elements] by referring to Vehicle Code section 23152 rather than another ‘unlawful act’ as required by the statute.” (*Id.* at p. 82.)

Lawful Act in an Unlawful Manner: Negligence

The statute uses the phrase “lawful act which might produce death, in an unlawful manner.” (Pen. Code, § 192(c)(3).) “[C]ommitting a lawful act in an unlawful manner simply means to commit a lawful act with negligence, that is, without reasonable caution and care.” (*People v. Thompson* (2000) 79 Cal.App.4th 40, 53.) Because the instruction lists the negligence requirement as element 3, the phrase “in an unlawful manner” is omitted from element 2 as repetitive.

STAFF NOTES

Pen. Code § 192(c)(3): Vehicular Manslaughter While Intoxicated Without Gross Negligence

Manslaughter is the unlawful killing of a human being without malice. It is of three kinds: (a) voluntary ... (b) Involuntary . . . (c) Vehicular -- (3) Driving a vehicle in violation of Section 23140, 23152, or 23153 of the Vehicle Code and in the commission of an unlawful act, not amounting to a felony, but without gross negligence; or driving a vehicle in violation of Section 23140, 23152, or 23153 of the Vehicle Code and in the commission of a lawful act which might produce death, in an unlawful manner, but without gross negligence. [. . .]

This section [§ 192] shall not be construed as making any homicide in the driving of a vehicle punishable which is not a proximate result of the commission of an unlawful act, not amounting to a felony, or of the commission of a lawful act which might produce death, in an unlawful manner.

Pen. Code § 192.5(c) Vehicular Manslaughter During Operation of a Vessel, While Intoxicated, Without Gross Negligence

Vehicular manslaughter pursuant to subdivision (c) of Section 192 includes . . . (c) Operating a vessel in violation of subdivision (b),(c),(d),(e), or (f) of Section 655 of the Harbors and Navigation Code, and in the commission of an unlawful act, not amounting to a felony, but without gross negligence; or operating a vessel in violation of subdivision (b),(c),(d),(e), or (f) of Section 655 of the Harbors and Navigation Code, and in the commission of a lawful act which might produce death, in an unlawful manner, but without gross negligence.

DUI Statutes

Veh. Code § 23152 states, in pertinent part:

(a) It is unlawful for any person who is under the influence of any alcoholic beverage or drug, or under the combined influence of any alcoholic beverage and drug, to drive a vehicle.

(b) It is unlawful for any person who has 0.08 percent or more, by weight, of alcohol in his or her blood to drive a vehicle.

Veh. Code § 23153 states, in pertinent part:

(a) It is unlawful for any person, while under the influence of any alcoholic beverage or drug, or under the combined influence of any alcoholic beverage and drug, to drive a vehicle and concurrently do any act forbidden by law, or neglect any duty imposed by law in driving the vehicle, which act or neglect proximately causes bodily injury to any person other than the driver.

(b) It is unlawful for any person, while having 0.08 percent or more, by weight, of alcohol in his or her blood to drive a vehicle and concurrently do any act forbidden by law, or neglect any duty imposed by law in driving the vehicle, which act or neglect proximately causes bodily injury to any person other than the driver.

Veh. Code § 23140 states, in pertinent part:

It is unlawful for a person under the age of 21 years who has 0.05 percent or more, by weight, of alcohol in his or her blood to drive a vehicle.

Harb. & Nav. Code § 655 states, in pertinent part:

(b) No person shall operate any vessel or manipulate water skis, an aquaplane, or a similar device while under the influence of an alcoholic beverage, any drug, or the combined influence of an alcoholic beverage and any drug.

(c) No person shall operate any recreational vessel or manipulate any water skis, aquaplane, or similar device if the person has an alcohol concentration of 0.08 percent or more in his or her blood.

(d) No person shall operate any vessel other than a recreational vessel if the person has an alcohol concentration of 0.04 percent or more in his or her blood.

(f) No person shall operate any vessel or manipulate water skis, an aquaplane, or a similar device while under the influence of an alcoholic beverage, any drug, or under the combined influence of an alcoholic beverage and any drug, and while so operating, do any act forbidden by law, or neglect any duty imposed by law in the use of the vessel, water skis, aquaplane, or similar device, which act or

neglect proximately causes bodily injury to any person other than himself or herself.

Unlawful Act Not Amounting to a Felony: Misdemeanor or Infraction

[See Staff Notes to 750. Gross Vehicular Manslaughter While Intoxicated.]

Lawful Act in an Unlawful Manner: Negligence

[See Staff Notes to 750. Gross Vehicular Manslaughter While Intoxicated.]

Definition of Ordinary Negligence

“It was not necessary in this case for the People to prove criminal ("gross") negligence, as ordinary negligence may form the basis of a vehicular manslaughter conviction.” (*In re Dennis B.* (1976) 18 Cal.3d 687, 696; *People v. Bussel* (2002) 97 Cal.App.4th Supp. 1, 8.)

“The words ‘neglect,’ ‘negligence,’ ‘negligent,’ and ‘negligently,’ import a want of such attention to the nature or probable consequences of the act or omission as a prudent man ordinarily bestows in acting in his own concerns.” (Cal Penal Code § 7 (2).)

Restatement Second of Torts, section 282 defines negligence as “conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm.”

“Negligence is the failure to use reasonable care to prevent harm to oneself or to others. A person can be negligent by acting or failing to act. A person is negligent if he or she does something that a reasonably careful person would not do in the same situation or fails to do something that a reasonably careful person would do in the same situation.” (Task Force Civil Instruction, 301, “Negligence: Basic Standard of Care.”)

Imminent Peril/Sudden Emergency Doctrine

[See Staff Notes to 750. Gross Vehicular Manslaughter While Intoxicated.]

Proximate Cause

[See Staff Notes to 750. Gross Vehicular Manslaughter While Intoxicated.]

Unanimity Instruction

[See Staff Notes to 750. Gross Vehicular Manslaughter While Intoxicated.]

772. Gross Vehicular Manslaughter

<If gross vehicular manslaughter is a charged offense, give option A; if this instruction is being given as a lesser included offense, give option B.>

<A. Charged Offense>

[The defendant is charged [in Count ____] with gross vehicular manslaughter.]

<B. Lesser Included Offense>

[Gross vehicular manslaughter is a lesser crime than gross vehicular manslaughter while intoxicated.]

To prove that the defendant is guilty of gross vehicular manslaughter, the People must prove that:

- 1. The defendant (drove a vehicle/operated a vessel).**
- 2. While (driving that vehicle/operating that vessel), the defendant committed (a misdemeanor [or infraction] /[or] a lawful act that might cause death).**
- 3. The defendant committed (that/those) act[s] with gross negligence.**

AND

- 4. The defendant's grossly negligent act[s] caused the death of another person.**

[The People allege that the defendant committed the following misdemeanor[s] [or infraction[s]]: _____ *<insert misdemeanor[s]/infraction[s]>*. To prove that the defendant committed _____ *<insert name of offense>*, the People must prove that:

<LIST ELEMENTS IF THE DEFENDANT IS NOT SEPARATELY CHARGED WITH [A] COUNT[S] ALLEGING [A] SEPARATE VIOLATION[S] OF THE RELEVANT STATUTE[S].>

[The People [also] allege that the defendant committed the following lawful act(s) that might cause death: _____ *<insert act[s] alleged>*.]

Gross negligence involves more than ordinary carelessness, inattention, or mistake in judgment. A person acts with gross negligence when:

1. He or she acts in a reckless way that creates a high risk of death or great bodily injury.

AND

2. A reasonable person would have known that acting in that way would create such a risk.

In other words, a person acts with gross negligence when the way he or she acts is so different from how an ordinarily careful person would act in the same situation that his or her act amounts to disregard for human life or indifference to the consequences of that act.

[*Great bodily injury* means significant or substantial physical injury.]

[The defendant is not guilty of gross vehicular manslaughter if:

1. There was a sudden and unexpected emergency situation in which the defendant or someone else was [or appeared to be] in danger of immediate injury.
2. The defendant did not cause the emergency.

AND

3. The defendant acted as a reasonably careful person would have acted in similar circumstances, even if it appears later that a different course of action would have been safer.]

[An act causes death if the death is the direct, natural, and probable consequence of the act. A *natural and probable consequence* is one that a reasonable and prudent person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all of the circumstances established by the evidence.]

[There may be more than one cause of death. An act causes death only if it is a substantial factor in causing the death. A *substantial factor* is more than a trivial or remote factor. However, it does not need to be the only factor that causes the death.]

82
83 [The People allege that the defendant committed the following
84 (misdemeanor[s]/infraction[s]/ [and] lawful act[s] that might cause death):
85 _____ <insert alleged predicate acts when multiple acts alleged>. You
86 may not find (the/a) defendant guilty unless all of you agree that the People
87 have proved that (the/a) defendant committed at least one of these alleged
88 acts and you all agree that the same act or acts were proved.]
89
90 [The People have the burden of proving beyond a reasonable doubt that the
91 defendant committed gross vehicular manslaughter. If the People have not
92 met this burden, you must find the defendant not guilty of that crime. You
93 must consider whether the defendant is guilty of the lesser crime[s] of
94 _____ <insert lesser offense[s]>.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

The court has a **sua sponte** duty to specify the predicate misdemeanor(s) or infraction(s) alleged and to instruct on the elements of the predicate offense(s). (*People v. Milham* (1984) 159 Cal.App.3d 487, 506; *People v. Ellis* (1999) 69 Cal.App.4th 1334, 1339.)

In element 2, instruct on either or both of the predicate offense(s) as appropriate.

There is a split in authority over whether there is a **sua sponte** duty to give a unanimity instruction when multiple predicate offenses are alleged. (*People v. Gary* (1987) 189 Cal.App.3d 1212, 1218 [unanimity instruction required, overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 481]; *People v. Durkin* (1988) 205 Cal.App.3d Supp. 9, 13 [unanimity instruction not required but preferable]; *People v. Mitchell* (1986) 188 Cal.App.3d 216, 222 [unanimity instruction not required]; *People v. Leffel* (1988) 203 Cal.App.3d 575, 586–587 [unanimity instruction not required, harmless error if was required].) A unanimity instruction is included in a bracketed paragraph should the court determine that such an instruction is appropriate. The jury need not specify which act or acts form the basis for their verdict.

If there is sufficient evidence and the defendant requests it, the court should instruct on the imminent peril/sudden emergency doctrine in the bracketed paragraph. (*People v. Boulware* (1940) 41 Cal.App.2d 268, 269–270.)

If causation is at issue, the court has a **sua sponte** duty to instruct on proximate cause. (*People v. Bernhardt* (1963) 222 Cal.App.2d 567, 590–591.) If the evidence indicates that there was only one cause of death, the court should give the “direct, natural, and probable” language in the first bracketed paragraph on causation. If there is evidence of multiple causes of death, the court should give the “substantial factor” instruction in the second bracketed paragraph on causation. (See *People v. Autry* (1995) 37 Cal.App.4th 351, 363; *People v. Pike* (1988) 197 Cal.App.3d 732, 746–747.)

AUTHORITY

- Gross Vehicular Manslaughter ▶ Pen. Code, § 192(c)(1).
Gross Vehicular Manslaughter During Operation of a Vessel ▶ Pen. Code, § 192.5(a).
Unlawful Act Dangerous Under the Circumstances of Its Commission ▶ *People v. Wells* (1996) 12 Cal.4th 979, 982.
Specifying Predicate Unlawful Act ▶ *People v. Milham* (1984) 159 Cal.App.3d 487, 506.
Elements of Predicate Unlawful Act ▶ *People v. Ellis* (1999) 69 Cal.App.4th 1334, 1339.
Unanimity Instruction ▶ *People v. Gary* (1987) 189 Cal.App.3d 1212, 1218 [overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 481]; *People v. Durkin* (1988) 205 Cal.App.3d Supp. 9, 13; *People v. Mitchell* (1986) 188 Cal.App.3d 216, 222; *People v. Leffel* (1988) 203 Cal.App.3d 575, 586–587.
Gross Negligence ▶ *People v. Bennett* (1992) 54 Cal.3d 1032, 1036.
Causation ▶ *People v. Rodriguez* (1960) 186 Cal.App.2d 433, 440.
Imminent Peril/Sudden Emergency Doctrine ▶ *People v. Boulware* (1940) 41 Cal.App.2d 268, 269.
- 1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against the Person, §§ 238–245, pp. 847–854.

LESSER INCLUDED OFFENSES

- Vehicular Manslaughter With Ordinary Negligence ▶ Pen. Code, § 192(c)(2); see *People v. Verlinde* (2002) 100 Cal. App. 4th 1146, 1165–1166.
Manslaughter During Operation of a Vessel Without Gross Negligence ▶ Pen. Code, § 192.5(b).

RELATED ISSUES

Predicate Act Need Not Be Inherently Dangerous

“[T]he offense which constitutes the ‘unlawful act’ need not be an inherently dangerous misdemeanor or infraction. Rather, to be an ‘unlawful act’ within the meaning of section 192(c)(1), the offense must be dangerous under the circumstances of its commission. An unlawful act committed with gross negligence would necessarily be so.” (*People v. Wells* (1996) 12 Cal.4th 979, 982.)

Lawful Act in an Unlawful Manner: Negligence

The statute uses the phrase “lawful act which might produce death, in an unlawful manner.” (Pen. Code, § 192(c)(1).) “[C]omitting a lawful act in an unlawful manner simply means to commit a lawful act with negligence, that is, without reasonable caution and care.” (*People v. Thompson* (2000) 79 Cal.App.4th 40, 53.) Because the instruction lists the negligence requirement as element 3, the phrase “in an unlawful manner” is omitted from element 2 as repetitive.

STAFF NOTES

Pen. Code § 192(c)(1): Gross Vehicular Manslaughter

Manslaughter is the unlawful killing of a human being without malice. It is of three kinds: (a) voluntary ... (b) Involuntary ... (c) Vehicular -- (1) Except as provided in Section 191.5 [Gross Vehicular Manslaughter while Intoxicated] driving a vehicle in the commission of an unlawful act, not amounting to a felony, and with gross negligence; or driving a vehicle in the commission of a lawful act which might produce death, in an unlawful manner, and with gross negligence. [. . .]

This section [§ 192] shall not be construed as making any homicide in the driving of a vehicle punishable which is not a proximate result of the commission of an unlawful act, not amounting to a felony, or of the commission of a lawful act which might produce death, in an unlawful manner.

Pen. Code § 192.5(a) Gross Vehicular Manslaughter During Operation of a Vessel

Vehicular manslaughter pursuant to subdivision (c) of Section 192 includes ... (a) Except as provided in Section 191.5 [Gross Vehicular Manslaughter while Intoxicated] operating a vessel in the commission of an unlawful act, not amounting to a felony, and with gross negligence; or operating a vessel in the commission of a lawful act which might produce death, in an unlawful manner, and with gross negligence.

Unlawful Act Dangerous Under The Circumstances of Its Commission [See Staff Notes to 750. Gross Vehicular Manslaughter While Intoxicated.]

Unlawful Act Not Amounting to a Felony: Misdemeanor or Infraction [See Staff Notes to 750. Gross Vehicular Manslaughter While Intoxicated.]

Lawful Act in an Unlawful Manner: Negligence [See Staff Notes to 750. Gross Vehicular Manslaughter While Intoxicated.]

Definition of Gross Negligence [See Staff Notes to 750. Gross Vehicular Manslaughter While Intoxicated.]

Imminent Peril/Sudden Emergency Doctrine [See Staff Notes to 750. Gross Vehicular Manslaughter While Intoxicated.]

Proximate Cause

[See Staff Notes to 750. Gross Vehicular Manslaughter While Intoxicated.]

Unanimity Instruction

[See Staff Notes to 750. Gross Vehicular Manslaughter While Intoxicated.]

773. Misdemeanor Vehicular Manslaughter—Ordinary Negligence

1 <If misdemeanor vehicular manslaughter is a charged offense, give option A; if
2 this instruction is being given as a lesser included offense, give option B.>

3
4 <A. Charged Offense>

5 **[The defendant is charged [in Count ____] with vehicular manslaughter.]**

6
7 <B. Lesser Included Offense>

8 **[Vehicular manslaughter with ordinary negligence is a lesser crime than**
9 **(gross vehicular manslaughter while intoxicated/ [and] gross vehicular**
10 **manslaughter/ [and] vehicular manslaughter with ordinary negligence while**
11 **intoxicated.)**

12
13 **To prove that the defendant is guilty of vehicular manslaughter [with**
14 **ordinary negligence], the People must prove that:**

- 15
16 **1. The defendant (drove a vehicle/operated a vessel).**
17
18 **2. While (driving that vehicle/operating that vessel), the defendant**
19 **committed (a misdemeanor [or infraction] /[or] a lawful act that**
20 **might cause death).**
21
22 **3. The defendant committed (that/those) act[s] with ordinary**
23 **negligence.**
24
25 **AND**
26
27 **4. The defendant's negligent act[s] caused the death of another person.**
28

29 **[The People allege that the defendant committed the following**
30 **misdemeanor[s] [or infraction[s]]:** _____ *<insert*
31 *misdemeanor[s]/infraction[s]>. **To prove that the defendant committed**
32 **_____ <insert name of offense>, the People must prove that:***

33
34 *<LIST ELEMENTS IF THE DEFENDANT IS NOT SEPARATELY*
35 *CHARGED WITH [A] COUNT[S] ALLEGING [A] SEPARATE*
36 *VIOLATION[S] OF THE RELEVANT STATUTE[S].>*

37
38 **[The People [also] allege that the defendant committed the following act[s]**

that might cause death: _____ <insert act[s] alleged>.]

[The difference between this offense and the charged offense of gross vehicular manslaughter is the degree of negligence required. I have already defined gross negligence for you.]

Ordinary negligence[, on the other hand,] is the failure to use reasonable care to prevent reasonably foreseeable harm to [oneself or] someone else. A person is negligent if he or she (does something that a reasonably careful person would not do in the same situation/ [or] fails to do something that a reasonably careful person would do in the same situation).

[The defendant is not guilty of gross vehicular manslaughter if:

1. There was a sudden and unexpected emergency situation in which the defendant or someone else was [or appeared to be] in danger of immediate injury.
2. The defendant did not cause the emergency.

AND

3. The defendant acted as a reasonably careful person would have acted in similar circumstances, even if it appears later that a different course of action would have been safer.]

[An act causes death if the death is the direct, natural, and probable consequence of the act. A *natural and probable consequence* is one that a reasonable and prudent person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all of the circumstances established by the evidence.]

[There may be more than one cause of death. An act causes death, only if it is a substantial factor in causing the death. A *substantial factor* is more than a trivial or remote factor. However, it does not need to be the only factor that causes the death.]

[The People allege that the defendant committed the following (misdemeanor[s]/infraction[s]/ [and] lawful act[s] that might cause death): _____ <insert alleged predicate acts when multiple acts alleged>. You may not find (the/a) defendant guilty unless all of you agree that the People have proved that (the/a) defendant committed at least one of these alleged acts and you all agree that the same act or acts were proved.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

The court has a **sua sponte** duty to specify the predicate misdemeanor(s) or infraction(s) alleged and to instruct on the elements of the predicate offense(s). (*People v. Milham* (1984) 159 Cal.App.3d 487, 506; *People v. Ellis* (1999) 69 Cal.App.4th 1334, 1339.)

In element 2, instruct on either or both of the predicate offense(s) as appropriate.

There is a split in authority over whether there is a **sua sponte** duty to give a unanimity instruction when multiple predicate offenses are alleged. (*People v. Gary* (1987) 189 Cal.App.3d 1212, 1218 [unanimity instruction required, overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 481]; *People v. Durkin* (1988) 205 Cal.App.3d Supp. 9, 13 [unanimity instruction not required but preferable]; *People v. Mitchell* (1986) 188 Cal.App.3d 216, 222 [unanimity instruction not required]; *People v. Leffel* (1988) 203 Cal.App.3d 575, 586–587 [unanimity instruction not required, harmless error if was required].) A unanimity instruction is included in a bracketed paragraph should the court determine that such an instruction is appropriate. The jury need not specify which act or acts form the basis for their verdict.

In the definition of ordinary negligence, the court should use the entire phrase “harm to oneself or someone else” if the facts of the case show a failure by the defendant to prevent harm to him- or herself rather than solely harm to another.

If there is sufficient evidence and the defendant requests it, the court should instruct on the imminent peril/sudden emergency doctrine in the bracketed paragraph. (*People v. Boulware* (1940) 41 Cal.App.2d 268, 269–270.)

If causation is at issue, the court has a **sua sponte** duty to instruct on proximate cause. (*People v. Bernhardt* (1963) 222 Cal.App.2d 567, 590–591.) If the evidence indicates that there was only one cause of death, the court should give the “direct, natural, and probable” language in the first bracketed paragraph on causation. If there is evidence of multiple causes of death, the court should give the “substantial factor” instruction in the second bracketed paragraph on causation. (See *People v. Autry* (1995) 37 Cal.App.4th 351, 363; *People v. Pike* (1988) 197 Cal.App.3d 732, 746–747.)

AUTHORITY

- Vehicular Manslaughter Without Gross Negligence ▶ Pen. Code, § 192(c)(2).
Vehicular Manslaughter During Operation of a Vessel Without Gross Negligence
▶ Pen. Code, § 192.5(b).
Unlawful Act Dangerous Under the Circumstances of Its Commission ▶ *People v. Wells* (1996) 12 Cal.4th 979, 982.
Specifying Predicate Unlawful Act ▶ *People v. Milham* (1984) 159 Cal.App.3d 487, 506.
Elements of Predicate Unlawful Act ▶ *People v. Ellis* (1999) 69 Cal.App.4th 1334, 1339.
Unanimity Instruction ▶ *People v. Gary* (1987) 189 Cal.App.3d 1212, 1218 [overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 481]; *People v. Durkin* (1988) 205 Cal.App.3d Supp. 9, 13; *People v. Mitchell* (1986) 188 Cal.App.3d 216, 222; *People v. Leffel* (1988) 203 Cal.App.3d 575, 586–587.
Ordinary Negligence ▶ Pen. Code, § 7, subd. 2; Rest.2d Torts, § 282.
Causation ▶ *People v. Rodriguez* (1960) 186 Cal.App.2d 433, 440.
Imminent Peril/Sudden Emergency Doctrine ▶ *People v. Boulware* (1940) 41 Cal.App.2d 268, 269.
- 1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against the Person, §§ 238–245, pp. 847–854.

RELATED ISSUES

Lawful Act in an Unlawful Manner: Negligence

The statute uses the phrase “lawful act which might produce death, in an unlawful manner.” (Pen. Code, § 192(c)(2).) “[C]ommitting a lawful act in an unlawful manner simply means to commit a lawful act with negligence, that is, without reasonable caution and care.” (*People v. Thompson* (2000) 79 Cal.App.4th 40, 53.) Because the instruction lists the negligence requirement as element 3, the phrase “in an unlawful manner” is omitted from element 2 as repetitive.

STAFF NOTES

Pen. Code § 192(c)(2): Vehicular Manslaughter Without Gross Negligence

Manslaughter is the unlawful killing of a human being without malice. It is of three kinds: (a) voluntary ... (b) Involuntary ... (c) Vehicular -- (1) Except as provided in paragraph (3) [§ 192(c)(3): Vehicular Manslaughter, without Gross Negligence, while Intoxicated], driving a vehicle in the commission of an unlawful act, not amounting to a felony, but without gross negligence; or driving a vehicle in the commission of a lawful act which might produce death, in an unlawful manner, but without gross negligence. [. . .]

This section [§ 192] shall not be construed as making any homicide in the driving of a vehicle punishable which is not a proximate result of the commission of an unlawful act, not amounting to a felony, or of the commission of a lawful act which might produce death, in an unlawful manner.

Pen. Code § 192.5(b) Vehicular Manslaughter During Operation of a Vessel Without Gross Negligence

Vehicular manslaughter pursuant to subdivision (c) of Section 192 includes ... (b) Except as provided subdivision (c)[§ 192.5(c) Vehicular Manslaughter committed during operation of a vessel while Intoxicated, but without gross negligence] operating a vessel in the commission of an unlawful act, not amounting to a felony, but without gross negligence; or operating a vessel in the commission of a lawful act which might produce death, in an unlawful manner, but without gross negligence.

Unlawful Act Not Amounting to a Felony: Misdemeanor or Infraction

[See Staff Notes to 750. Gross Vehicular Manslaughter While Intoxicated.]

Lawful Act in an Unlawful Manner: Negligence

[See Staff Notes to 750. Gross Vehicular Manslaughter While Intoxicated.]

Ordinary Negligence

[See Staff Notes to 751. Vehicular Manslaughter While Intoxicated (Ordinary Negligence).]

Imminent Peril/Sudden Emergency Doctrine

[See Staff Notes to 750. Gross Vehicular Manslaughter While Intoxicated.]

Proximate Cause

[See Staff Notes to 750. Gross Vehicular Manslaughter While Intoxicated.]

Unanimity Instruction

[See Staff Notes to 750. Gross Vehicular Manslaughter While Intoxicated.]

774. Vehicular Manslaughter: Collision for Financial Gain

1 **The defendant is charged [in Count ____] with vehicular manslaughter by**
2 **causing a collision for financial gain.**

3
4 **To prove that the defendant is guilty of this crime, the People must prove**
5 **that:**

6
7 **1. The defendant drove a vehicle.**

8
9 **2. In connection with driving that vehicle, the defendant knowingly**
10 **caused or participated in a vehicular collision.**

11
12 **3. When the defendant acted, (he/she) knew that the purpose of the**
13 **vehicular collision was to make a false or fraudulent insurance**
14 **claim for financial gain.**

15
16 **AND**

17
18 **4. The collision caused the death of another person.**

19
20 **[An act causes death if the death is the direct, natural, and probable**
21 **consequence of the act. A *natural and probable consequence* is one that a**
22 **reasonable and prudent person would know is likely to happen if nothing**
23 **unusual intervenes. In deciding whether a consequence is natural and**
24 **probable, consider all of the circumstances established by the evidence.]**

25
26 **[There may be more than one cause of death. An act causes death only if it is**
27 **a substantial factor in causing the death. A *substantial factor* is more than a**
28 **trivial or remote factor. However, it does not need to be the only factor that**
29 **causes the death.]**

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If causation is at issue, the court has a **sua sponte** duty to instruct on proximate

cause. (*People v. Bernhardt* (1963) 222 Cal.App.2d 567, 590–591.) If the evidence indicates that there was only one cause of death, the court should give the “direct, natural, and probable” language in the first bracketed paragraph on causation. If there is evidence of multiple causes of death, the court should give the “substantial factor” instruction in the second bracketed paragraph on causation. (See *People v. Autry* (1995) 37 Cal.App.4th 351, 363; *People v. Pike* (1988) 197 Cal.App.3d 732, 746–747.)

AUTHORITY

Elements ▶ Pen. Code, § 192(c)(4).

Causation ▶ *People v. Rodriguez* (1960) 186 Cal.App.2d 433, 440.

1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against the Person, § 236 .

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Property, § 185.

RELATED ISSUES

Does Not Preclude Murder Charge

Section 192(c)(4) of the Penal Code states that: “This provision shall not be construed to prevent prosecution of a defendant for the crime of murder.”

Mental State and Negligence

Section 192(c)(4) of the Penal Code requires that the defendant commit the vehicular collision knowing that the collision is for the purpose of insurance fraud. Section 192(c)(4) thus requires a specific mental state (knowledge of the criminal purpose of the collision) in addition to the criminal act (the vehicular collision/homicide).

Probable and Natural Consequences of a Conspiracy

A nondriver coconspirator may be liable for a death that results from a conspiracy to commit a vehicular collision for insurance fraud, as stated in *People v. Superior Court (Shamis)* (1998) 58 Cal.App.4th 833, 842—843 [quoting *People v. Luparello* (1986) 187 Cal.App.3d 410, 442]:

“[P]roof of a conspiracy serves to impose criminal liability on all conspirators for crimes committed in furtherance of the conspiracy. . . .” Further, “a conspirator is criminally liable for the act of a coconspirator which follows as a probable and natural consequence of the common design, even though it [is] not intended as a part of the original design or common plan. [Citations.]”

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Provocative Act Doctrine

Under the provocative act doctrine, a coconspirator may be charged with *murder* based on his or her vicarious liability for the acts of an accomplice. (*People v. Superior Court (Shamis)* (1998) 58 Cal.App.4th 833, 845–846.)

STAFF NOTES

Pen. Code, § 192(c)(4):

Manslaughter is the unlawful killing of a human being without malice. It is of three kinds: (a) voluntary ... (b) Involuntary ... (c) Vehicular -- (4) Driving a vehicle in connection with a violation of paragraph (3) of subdivision (a) of Section 550 [of the Penal Code], where the vehicular collision or vehicular accident was knowingly caused for financial gain and proximately resulted in the death of any person. This provision shall not be construed to prevent prosecution of a defendant for the crime of murder.

Penal Code, § 550(a)(3) – False or Fraudulent Claims or Statements: Prohibited Acts:

(a) It is unlawful to do any of the following, or to aid, abet, solicit, or conspire with any person to do any of the following: . . . (3) Knowingly cause or participate in a vehicular collision, or any other vehicular accident, for the purpose of presenting any false or fraudulent claim.

Legislative History—Financial Gain Requirement

Penal Code section 192(c)(4) was enacted in 1998 in response to the fatal accident in the case of *People v. Superior Court (Shamis)* (1998) 58 Cal.App.4th 833. The Legislative history of the statute states:

This bill would create a fourth type of vehicular manslaughter for any death that proximately results from a vehicular collision or vehicular accident where the collision or accident was knowingly caused for financial gain under Penal Code section 550. The penalty for this type of vehicular manslaughter would be 4, 6 or 10 years.

[. . .]

1. Need for the Bill

According to background provided by the author there is a growing problem, especially in the Los Angeles area, with groups of people staging car accidents to collect insurance money. Some of these staged accidents will involve multiple cars on the freeway. One car will slow down in front of the victim who will then be cut off by and forced to rear-end another car. The car that is hit will often contain more than one adult all of whom will file insurance claims. Another method is for the person committing the fraud to wave a person

trying to merge into traffic in and then cause the driver to sideswipe them and later deny waving the person in. Some of the accidents have involved serious injuries and death.

In order to prove second degree it must be shown that the defendant knew his or her conduct endangered the life of another and acted with a conscious disregard for life which is often difficult to prove. (See: People v. Watson (1981) 30 Cal.3d. 290.) Thus, this bill provides for an increased penalty for vehicular manslaughter for these staged accidents so that even if it is not possible to prove 2nd degree murder persons responsible for these deaths will be subject to stiff penalties.

2. Increased Penalty for Death Occurring During Staged Accident

This bill creates a new type of vehicular manslaughter for deaths that proximately result from a vehicular accident where the collision or accident was knowingly caused for financial gain in violation of provisions outlawing such accidents. The penalty for this new provision is set at 4, 6 and 10 years which is the same as the penalty for gross vehicular manslaughter DUI. The author argues that the act of getting in a car while DUI and acting with gross negligence is similar to the act of staging a vehicle accident, where the likelihood of injury or death is high, and thus

(S.B. 1407, Senate Bill-Bill Analysis, Senate Committee on Public Safety (1997-1998).)

The bill analysis quoted above states that the accident must be “knowingly caused for financial gain under Penal Code section 550,” or “knowingly caused for financial gain in violation of provisions outlawing such accidents.” (*Ibid.*) The statute, quoted above, states:

Driving a vehicle in connection with a violation of paragraph (3) of subdivision (a) of Section 550 [of the Penal Code], where the vehicular collision or vehicular accident was knowingly caused for financial gain and proximately resulted in the death of any person.

From the legislative history, it appears that what the legislature intended by this sentence was that the accident was, “knowingly caused for financial gain under Penal Code section 550.”

There are no published cases on this statute.

Proximate Cause

[See Staff Notes to 750. Gross Vehicular Manslaughter while Intoxicated.]

775. Vehicular Manslaughter: Speeding Laws Defined

1 <A. Violation of Maximum Speed Law, Veh. Code, § 22349>

2 [To prove that the defendant committed a violation of the maximum speed
3 law, the People must prove that:

4
5 1. The defendant drove a vehicle on a highway.

6
7 AND

8
9 2. The defendant drove faster than (65/55/_____ <insert other
10 posted speed limit> mph.

11
12 [The term *highway* describes any area publicly maintained and open to the
13 public for purposes of vehicular travel and includes a street.]]

14
15 <B. Violation of Basic Speed Law, Veh. Code, § 22350>

16 [To prove that the defendant committed a violation of the basic speed law, the
17 People must prove that:

18
19 1. The defendant drove a vehicle on a highway.

20
21 AND

22
23 2. The defendant drove (faster than a reasonable person would have
24 driven considering the weather, visibility, traffic, and conditions of
25 the highway/ [or] at a speed that endangered the safety of other
26 people or property).

27
28 The speed of travel, alone, does not establish whether a person did or did not
29 violate the basic speed law. When determining whether the defendant
30 violated the basic speed law, consider not only the speed, but also all the
31 surrounding conditions known by the defendant and also what a reasonable
32 person would have considered a safe rate of travel given those conditions.

33
34 [The term *highway* describes any area publicly maintained and open to the
35 public for purposes of vehicular travel and includes a street.]]

36
37 <C. Violation of Prima Facie Speed Law, Veh. Code, §§ 22351, 22352>

38 [To prove that the defendant committed a violation of the prima facie speed

39 law, the People must prove that:

40
41 1. The defendant drove a vehicle on a highway.

42
43 2. The defendant drove faster than (15/25) mph.

44
45 [AND]

46
47 3. The defendant drove _____ <insert appropriate description
48 from Veh. Code, § 22352 of area where alleged violation occurred>.

49
50 [AND]

51
52 4. The defendant's rate of speed was faster than a reasonable person
53 would have driven considering the weather, visibility, traffic, and
54 conditions of the highway.]

55
56 [The term *highway* describes any area publicly maintained and open to the
57 public for purposes of vehicular travel and includes a street.]

58
59 [When determining whether the defendant drove faster than a reasonable
60 person would have driven, consider not only the speed, but also all the
61 surrounding conditions known by the defendant and also what a reasonable
62 person would have considered a safe rate of travel given those conditions.

63
64 The People have the burden of proving beyond a reasonable doubt that the
65 defendant's rate of travel was not reasonable given the overall conditions,
66 even if the rate of travel was faster than the prima facie speed law. If the
67 People have not met this burden, you must find the defendant did not violate
68 the prima facie speed law.]]

BENCH NOTES

Instructional Duty

In a vehicular manslaughter case, the court has a **sua sponte** duty instruct on the elements of the predicate misdemeanors or infractions alleged. (*People v. Ellis* (1999) 69 Cal.App.4th 1334, 1339.)

When instructing on the prima facie speed law, insert the appropriate description of where the defendant was driving when the alleged violation occurred. Give bracketed element 4 and the two bracketed paragraphs beginning with "When determining whether the defendant drove faster than a reasonable person," if the

defendant presents evidence that the rate of travel was not in violation of the basic speed law even though in violation of the prima facie speed law. (Veh. Code, §§ 22351, 22352.)

The court should define the term highway; however, it need only be defined once. If the court instructs on multiple Vehicle Code sections, give the bracketed definition of highway at the end of the last Vehicle Code section instructed upon.

AUTHORITY

Maximum Speed Law ▶ Veh. Code, § 22349.

Basic Speed Law ▶ Veh. Code, § 22350.

Prima Facie Speed Law ▶ Veh. Code, §§ 22351, 22352.

Duty to Instruct on Elements of Predicate Offense ▶ *People v. Ellis* (1999) 69 Cal.App.4th 1334, 1339.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against the Public Peace and Welfare, § 253.

STAFF NOTES

Veh. Code § 22350:

No person shall drive a vehicle upon a highway at a speed greater than is reasonable or prudent having due regard for weather, visibility, the traffic on, and the surface and width of, the highway, and in no event at a speed which endangers the safety of persons or property.

Veh. Code § 360:

"Highway" is a way or place of whatever nature, publicly maintained and open to the use of the public for purposes of vehicular travel. Highway includes street.

Veh. Code § 22351:

(a) The speed of any vehicle upon a highway not in excess of the limits specified in Section 22352 or established as authorized in this code is lawful unless clearly proved to be in violation of the basic speed law.

(b) The speed of any vehicle upon a highway in excess of the prima facie speed limits in Section 22352 or established as authorized in this code is prima facie unlawful unless the defendant establishes by competent evidence that the speed in excess of said limits did not constitute a violation of the basic speed law at the time, place and under the conditions then existing.

Veh. Code § 22352:

(a) The prima facie limits are as follows and shall be applicable unless changed as authorized in this code and, if so changed, only when signs have been erected giving notice thereof:

(1) Fifteen miles per hour:

(A) When traversing a railway grade crossing, if during the last 100 feet of the approach to the crossing the driver does not have a clear and unobstructed view of the crossing and of any traffic on the railway for a distance of 400 feet in both directions along the railway. This subdivision does not apply in the case of any railway

grade crossing where a human flagman is on duty or a clearly visible electrical or mechanical railway crossing signal device is installed but does not then indicate the immediate approach of a railway train or car.

(B) When traversing any intersection of highways if during the last 100 feet of the driver's approach to the intersection the driver does not have a clear and unobstructed view of the intersection and of any traffic upon all of the highways entering the intersection for a distance of 100 feet along all those highways, except at an intersection protected by stop signs or yield right-of-way signs or controlled by official traffic control signals.

(C) On any alley.

(2) Twenty-five miles per hour:

(A) On any highway other than a state highway, in any business or residence district unless a different speed is determined by local authority under procedures set forth in this code.

(B) When approaching or passing a school building or the grounds thereof, contiguous to a highway and posted with a standard "SCHOOL" warning sign, while children are going to or leaving the school either during school hours or during the noon recess period. The prima facie limit shall also apply when approaching or passing any school grounds which are not separated from the highway by a fence, gate, or other physical barrier while the grounds are in use by children and the highway is posted with a standard "SCHOOL" warning sign. For purposes of this subparagraph, standard "SCHOOL" warning signs may be placed at any distance up to 500 feet away from school grounds.

(C) When passing a senior center or other facility primarily used by senior citizens, contiguous to a street other than a state highway and posted with a standard "SENIOR" warning sign. A local authority is not required to erect any sign pursuant to this paragraph until donations from private sources covering those costs are received and the local agency makes a determination that the proposed signing should be implemented. A local authority may, however, utilize any other funds available to it to pay for the erection of those signs.

Veh. Code § 22349, in relevant part:

(a) Except as provided in Section 22356, no person may drive a vehicle upon a highway at a speed greater than 65 miles per hour.

(b) Notwithstanding any other provision of law, no person may drive a vehicle upon a two-lane, undivided highway at a speed greater than 55 miles per hour unless that highway, or portion thereof, has been posted for a higher speed by the Department of Transportation or appropriate local agency upon the basis of an engineering and traffic survey.

Duty to Instruct on Meaning of Speeding

The question then arises whether common knowledge of the basic speed law is sufficient to simply reference the violation as "speeding" rather than expanding the reference by way of definition. To answer this question, we need to identify what precisely the judge *sua sponte* could have instructed the jury. Speeding under section 22350 is driving [statute quoted in full above]. While these definitions are not terribly technical, they do supply the jury with legal standards to apply to specific considerations. Was the speed *reasonable* in light of the enumerated considerations, such as the traffic on the road? Was defendant's speed *dangerous* to other persons or property? Absent being instructed in these standards for deliberation, jurors may view speeding as occurring anytime one vehicle collides with the rear end of another, regardless of examining questions of circumstance, reasonableness and danger; or they may believe that speeding occurs only when the posted speed limit is exceeded. Thus we cannot say with full confidence that the term "speeding," in the context of a violation of law, in common parlance is regularly associated with driving at a speed greater than is reasonable or prudent, or at a speed which endangers the safety of persons or property. [. . .] Because the term speeding, in the context of the basic speed law, is not clear and definite, the trial court had a *sua sponte* duty to give an amplifying or clarifying instruction defining the term.

(*People v. Ellis* (1999) 69 Cal.App.4th 1334, 1339.)

780. Causation: Special Issues

1 **There may be more than one cause of death. An act causes death only if it is a**
2 **substantial factor in causing the death. A *substantial factor* is more than a trivial or**
3 **remote factor. However, it does not need to be the only factor that causes the death.**
4

5 *<A. Negligence of Decedent or Third Party, Not Medical Personnel>*

6 **[The failure of _____ *<insert name of decedent>* or another person to use**
7 **reasonable care may have contributed to the death. But if the defendant's act was a**
8 **substantial factor causing the death, then the defendant is legally responsible for the**
9 **death even though _____ *<insert name of decedent>* or another person may**
10 **have failed to use reasonable care.]**
11

12 *<B. Negligence of Medical Personnel>*

13 **[The failure of the (doctor(s)/ [or] medical staff) to use reasonable care in treating**
14 **_____ *<insert name of decedent>* may have contributed to the death. But if the**
15 **injury inflicted by the defendant was a substantial factor causing the death, then the**
16 **defendant is legally responsible for the death even though the (doctor(s)/ [or]**
17 **medical staff) may have failed to use reasonable care. On the other hand, if the**
18 **injury inflicted by the defendant was minor and was not a substantial factor causing**
19 **the death, but the death was caused by grossly improper treatment by the**
20 **(doctor(s)/[or] medical staff), then the defendant is not legally responsible for the**
21 **death.]**
22

23 *<C. Vulnerable Victim—Injury Accelerating Death>*

24 **[_____ *<insert name of decedent>* may have suffered from an illness or physical**
25 **condition that made (him/her) more vulnerable than the average person. The fact**
26 **that _____ *<insert name of decedent>* may have been more physically**
27 **vulnerable is not a defense to (murder/ [or] manslaughter). If the defendant's act**
28 **was a substantial factor causing the death, then the defendant is legally responsible**
29 **for the death. This is true even if _____ *<insert name of decedent>* would have**
30 **died in a short time as a result of other causes or if another person of average health**
31 **would not have died as a result of the defendant's actions.]**
32

33 **If you have a reasonable doubt whether the defendant's act caused the death, you**
34 **must find (him/her) not guilty.**

BENCH NOTES

Instructional Duty

If causation is at issue, the court has a **sua sponte** duty to instruct on proximate cause. (*People v. Bernhardt* (1963) 222 Cal.App.2d 567, 590–591.)

AUTHORITY

Negligence of Third Party ▶ *People v. Clark* (1951) 106 Cal.App.2d 271, 277–278; *People v. Pike* (1988) 197 Cal.App.3d 732, 746–747.

Negligence of Medical Staff ▶ *People v. McGee* (1947) 31 Cal.2d 229, 240–241.

Vulnerable Victim ▶ *People v. Phillips* (1966) 64 Cal.2d 574, 579; *People v. Stamp* (1969) 2 Cal.App.3d 203, 209.

1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Elements, §§ 37, 38, 43.

STAFF NOTES

Negligence of Decedent or Third Party

The fact that death may have been accelerated [by the conduct of a third party] becomes unimportant unless it be shown that the accelerating cause was also a supervening cause, in which latter case, the defendant is relieved of responsibility for the death in that such act was manifestly not the proximate cause. If the victim dies within a year and a day, and if the act charged against the accused be the ultimate, though not the immediate cause of death, it is criminal.

(*People v. Clark* (1951) 106 Cal.App.2d 271, 277-78.) Thus, even though death was accelerated by the family removing the victim from the hospital, the defendant was liable for the death where the drunk driving accident caused the victim's broken neck. (*Ibid.*)

Negligence of Medical Staff

"When a person inflicts a wound on another which is dangerous, or calculated to destroy life, the fact that the negligence, mistake, or lack of skill of an attending physician or surgeon contributes to the death affords no defense to a charge of homicide." [Citation.] Following this general rule, it has been held that where the wound inflicted by the accused operates as a cause of death, the fact that the malpractice of attending surgeons may have had some causative influence will not relieve the accused from full responsibility for the ultimate result of his act. [Citation.]

On the other hand, in qualification of the rule, it is said that, "Where a person inflicts on another a wound not in itself calculated to produce death, and the injured person dies solely as a result of the improper treatment of the wound by an attending physician or surgeon, the fact that the death was caused by medical mistreatment is a good defense to a charge of homicide," [citation]. On this subject it has been said to be "the proper, and probably generally accepted, view . . . that mere negligence [in the treating of a wound] is no defense even though it is the sole cause of death because it is a foreseeable intervening cause. But death caused by grossly improper treatment is not the proximate consequence of the defendant's injury unless the injury is an actual contributing factor at the time of death,

because such treatment is an unforeseeable intervening cause.
[Citation.]

(*People v. McGee* (1947) 31 Cal.2d 229, 240-41.)

Vulnerable Victim--

Murder is never more than the shortening of life; if a defendant's culpable act has significantly decreased the span of a human life, the law will not hear him say that his victim would thereafter have died in any event.

(*People v. Phillips* (1966) 64 Cal.2d 574, 579.) The defendant's actions caused the death of a girl with cancer where the defendant told her parents that he could cure her brain tumor, thus causing the parents to forgo a potentially life saving operation. (*Ibid.*) Similarly, the defendants' actions caused death of the victim where the defendants robbed the victim and the victim, who had a heart condition, died of a heart attack. (*People v. Stamp* (1969) 2 Cal.App.3d 203, 209.)

785. Homicide Law Summarized

1 I will now give you a summary of how the different kinds of homicide relate
2 to one another. [In this summary, I am not including a discussion of felony
3 murder.]

4
5 A killing done without a valid excuse or justification is an unlawful killing.
6 The People have the burden of proving beyond a reasonable doubt that the
7 defendant killed and that (he/she) did so without lawful excuse or
8 justification. If the People have not met this burden, you must find the
9 defendant not guilty.

10
11 If the People have proved that the defendant killed and that (he/she) did so
12 without lawful excuse or justification, you must decide whether the killing
13 was:

14
15 First degree murder;

16
17 Second degree murder, which is a lesser offense of first degree murder;
18 or

19
20 Voluntary manslaughter or involuntary manslaughter, which are lesser
21 offenses of second degree murder.

22
23 You may consider these issues in any order.

24
25 When a person kills someone unlawfully with malice aforethought, that
26 killing is murder. A person acts with malice aforethought when he or she
27 either intends to kill or acts with conscious disregard for human life.

28
29 Murder is either of the first or second degree. [For first degree murder, the
30 person must act with the intent to kill formed after deliberation and
31 premeditation.] [An intentional killing done by shooting a firearm from a
32 motor vehicle is [also] first degree murder.] [A killing accomplished by means
33 of _____ <insert "torture," "lying in wait," "destructive device," "weapon
34 of mass destruction," "penetrating ammunition," or "poison"> is [also] first
35 degree murder.] All other murders are second degree murders.

36
37 When a person kills unlawfully [in the heat of passion] [or] [in what is called
38 imperfect self-defense], malice is legally negated. When malice has been
39 legally negated, the person is not guilty of murder.

40
41 **When a person kills unlawfully, acting with the intent to kill or with conscious**
42 **disregard for human life, but malice has been negated, then the crime is**
43 **voluntary manslaughter.**

44
45 **When a person kills unlawfully but acts without the intent to kill or without**
46 **conscious disregard for human life, then the crime is involuntary**
47 **manslaughter.**

48
49 **[A person can be guilty of murder or manslaughter even though the actual**
50 **killing was done by someone else. I have given you specific instructions that**
51 **explain how to decide whether a person is guilty in that situation.]**

52
53 **Remember that this instruction is only a summary. The purpose of this**
54 **summary is to give you a general overview of the law of homicide. In deciding**
55 **this case, you must rely on all the instructions that I have given you, not on**
56 **this summary alone.**

BENCH NOTES

Instructional Duty

This instruction is provided to assist the court in explaining the law of homicide to the jury. The instruction is to be given after the other homicide instructions, just prior to Instruction 786 or 787.

The court should modify this instruction if the jury is not being instructed on all four types of homicide.

STAFF NOTES

Relationship Between Murder, Voluntary, & Involuntary Manslaughter

Voluntary manslaughter homicides are unlawful killings that have the elements of either express or implied malice and would otherwise be murder; however, heat of passion/provocation or imperfect self defense negate the elements of malice reducing the crime to *voluntary* manslaughter. (*People v. Rios* (2000) 23 Cal.4th 450, 461.) In contrast, *involuntary* manslaughter is committed without the elements of either express or implied malice. (*People v. Rios, supra*, 23 Cal.4th at p. 470 (conc. opn of Mosk, J.).)

Criminal Negligence Contrasted with Implied Malice

“A finding of gross negligence is made by applying an *objective* test: if a *reasonable person* in defendant’s position would have been aware of the risk involved, then defendant is presumed to have had such an awareness. However, a finding of implied malice depends upon a determination that defendant *actually appreciated* the risk involved, i.e., a *subjective* standard.” (*People v. Watson* (1981) 30 Cal.3d 290, 296-297 [emphasis in original][citations omitted]).

“If a defendant commits an act endangering human life, without realizing the risk involved, the defendant has acted with criminal negligence. By contrast, where the defendant realizes and then acts in total disregard of the danger, the defendant is guilty of murder based on implied malice.” (*People v. Evers* (1992) 10 Cal.App.4th 588, 596.)

Dewberry Instruction

For any case involving a lesser-included offense, the trial court has a **sua sponte** duty to give a *Dewberry* instruction. (*People v. Crone* (1997) 54 Cal.App.4th 71, 76.) “[W]hen the evidence is sufficient to support a finding of guilt of both the offense charged and a lesser included offense, the jury must be instructed that if they entertain a reasonable doubt as to which offense has been committed, they must find the defendant guilty only of the lesser offense.” (*People v. Dewberry* (1959) 51 Cal.2d 548, 555.) A *Dewberry* instruction is required whether the lesser-included offense is charged or uncharged. (*People v. Crone, supra*, 54 Cal.App.4th at p. 78.)

786. Duty of Jury: Deliberations and Completion of Verdict Forms

1 **You have been given several verdict forms for (the/each) count of**
2 **(murder/manslaughter). [These instructions apply to each count separately.]**
3

4 **In connection with Count[s] _____, I have given you _____** *<insert number of*
5 *verdict forms>* **separate verdict forms. These are: Guilty/Not Guilty of (first**
6 **degree murder[,]/ [and] second degree murder[,]/ [and] voluntary**
7 **manslaughter[,]/ [and] involuntary manslaughter).**
8

9 **You may consider these different kinds of homicide in whatever order you**
10 **wish. I am going to explain how to complete the verdict forms using one**
11 **order, but you may choose the order you use.**
12

13 **As with all the charges in this case, to return a verdict of guilty or not guilty**
14 **on a count, you must all agree on that decision.**
15

16 **If you all agree the People have not proved the defendant committed an**
17 **unlawful killing, then you must complete each verdict form stating that**
18 **(he/she) is not guilty.**
19

20 **If you all agree the People have proved the defendant killed unlawfully, you**
21 **must decide what kind or degree of unlawful killing the People have proved.**
22

23 **If you all agree the unlawful killing was first degree murder, complete the**
24 **verdict form finding the defendant guilty of first degree murder. Do not**
25 **complete the other verdict forms for this count.**
26

27 **If you all agree that the defendant is not guilty of first degree murder, but you**
28 **agree the People have proved the killing was second degree murder, you must**
29 **do two things. First, complete the verdict form finding the defendant not**
30 **guilty of first degree murder. Then, complete the verdict form finding the**
31 **defendant guilty of second degree murder. Do not complete the verdict form**
32 **finding the defendant guilty of second degree murder unless you all agree that**
33 **the defendant is not guilty of first degree murder. Do not complete the other**
34 **verdict forms for this count.**
35

36 **If you all agree the People have proved the defendant committed murder, but**
37 **you cannot all agree on which degree they have proved, do not complete any**

verdict forms. Instead, the foreperson should send a note reporting that you cannot all agree on the degree of murder that has been proved.

If you all agree that the defendant is not guilty of first degree murder, but you cannot all agree on whether or not the People have proved the defendant committed second degree murder, then you must do two things. First, complete the verdict form finding the defendant not guilty of first degree murder. Second, the foreperson should send a note reporting that you cannot all agree that second degree murder has been proved. Do not complete any other verdict forms for this count.

<A. Voluntary Manslaughter: Lesser Included>

[If you all agree that the defendant is not guilty of first or second degree murder, but you all agree the People have proved that (he/she) is guilty of voluntary manslaughter, then you must do two things. First, complete both verdict forms finding (him/her) not guilty of first and second degree murder. Second, complete the verdict form finding (him/her) guilty of voluntary manslaughter. Do not complete the verdict form finding the defendant guilty of voluntary manslaughter unless you all agree that the defendant is not guilty of murder. Do not complete any other verdict forms for this count.

If you all agree that the defendant is not guilty of first or second degree murder, but you cannot all agree on whether or not the People have proved the defendant committed voluntary manslaughter, then you must do two things. First, complete both verdict forms finding the defendant not guilty of first and second degree murder. Second, the foreperson should send a note reporting that you cannot all agree that voluntary manslaughter has been proved.]

<B. Involuntary Manslaughter: Lesser Included>

[If you all agree that the defendant is not guilty of murder or voluntary manslaughter, but you all agree the People have proved that (he/she) is guilty involuntary manslaughter, then you must do two things. First, complete all three verdict forms finding (him/her) not guilty of first degree murder, second degree murder, and voluntary manslaughter. Second, complete the verdict form finding (him/her) guilty of involuntary manslaughter. Do not complete the verdict form indicating the defendant is guilty of involuntary manslaughter unless you all agree that the defendant is not guilty of murder or voluntary manslaughter.

If you all agree that the defendant is not guilty of murder or voluntary manslaughter, but you cannot all agree whether or not the People have

80 proved the defendant committed involuntary manslaughter, then you must do
81 two things. First, complete all three verdict forms finding the defendant not
82 guilty of first degree murder, second degree murder, and voluntary
83 manslaughter. Second, the foreperson should send a note reporting that you
84 cannot all agree that involuntary manslaughter has been proved.]

85
86 <C. Enhancements Alleged>

87 [You have also been given verdict forms on the additional allegation[s]
88 related to (the/a) crime[s]. If you find the defendant not guilty of a crime, you
89 do not need to consider the additional allegation[s]. If you find the defendant
90 guilty of a crime, go on to consider whether the People have proved the
91 additional allegation[s]. If you all agree that an allegation has or has not been
92 proved, you must indicate that finding on the verdict form [for that
93 allegation].]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct the jury that it must specify the degree of murder and must reach a unanimous verdict on degree. (See *People v. Avalos* (1984) 37 Cal.3d 216, 228; *People v. Dixon* (1979) 24 Cal.3d 43, 52; Pen. Code, § 1157.) The court has a **sua sponte** duty to instruct the jury that it may render a verdict of partial acquittal on a greater offense when it is deadlocked on a lesser included offense. (*People v. Marshall* (1996) 13 Cal.4th 799, 826; *Stone v. Superior Court* (1982) 31 Cal.3d 503, 519.)

In *Stone v. Superior Court*, *supra*, 31 Cal.3d at p. 519, the Supreme Court suggested that the trial court provide the jury with verdict forms of guilty/not guilty on each of the charged and lesser offenses. The court later referred to this “as a judicially declared rule of criminal procedure.” (*People v. Kurtzman* (1988) 46 Cal.3d 322, 328.) However, this is not a mandatory procedure. (*Ibid.*) If the court chooses not to follow the procedure suggested in *Stone*, the court may give Instruction 787, Duty of Jury: Without *Stone* Instruction, in place of this instruction.

The court may not accept a guilty verdict on a lesser degree of homicide unless the jury unanimously agrees that the defendant is not guilty of the greater offense. (*People v. Kurtzman* (1988) 46 Cal.3d 322, 330; *People v. Avalos*, *supra*, 37 Cal.3d at pp. 216, 228.)

The court may not control the sequence in which the jury considers the various homicide offenses. (*People v. Kurtzman*, *supra*, 46 Cal.3d at pp. 322, 330.)

Do not give this instruction if felony murder is the only theory for first degree murder. (*People v. Mendoza* (2000) 23 Cal.4th 896, 908–909.)

This instruction should be modified if the highest charge is second degree murder or voluntary manslaughter. (*People v. Aikin* (1971) 19 Cal.App.3d 685, 700 [error to instruct jury that it must agree on degree of murder where case submitted to jury on second degree murder only].)

AUTHORITY

Degree to Be Set by Jury ▶ Pen. Code, § 1157; *People v. Avalos* (1984) 37 Cal.3d 216, 228; *People v. Dixon* (1979) 24 Cal.3d 43, 52.

Reasonable Doubt as to Degree ▶ Pen. Code, § 1097; *People v. Morse* (1964) 60 Cal.2d 631, 657.

Must Permit Partial Verdict of Acquittal ▶ *Stone v. Superior Court* (1982) 31 Cal.3d 503, 519.

5 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Trial, § 631.

STAFF NOTES

Pen. Code § 1157:

Whenever a defendant is convicted of a crime or attempt to commit a crime which is distinguished into degrees, the jury, or the court if a jury trial is waived, must find the degree of the crime or attempted crime of which he is guilty. Upon the failure of the jury or the court to so determine, the degree of the crime or attempted crime of which the defendant is guilty, shall be deemed to be of the lesser degree.

Pen. Code § 1097:

When it appears that the defendant has committed a public offense, or attempted to commit a public offense, and there is reasonable ground of doubt in which of two or more degrees of the crime or attempted crime he is guilty, he can be convicted of the lowest of such degrees only.

Guilty/ Not Guilty Verdict Forms for Each Offense

In [*Stone v. Superior Court* (1982) 31 Cal.3d 503, 519] we held that a "trial court is constitutionally obligated to afford the jury an opportunity to render a partial verdict of acquittal on a greater offense when the jury is deadlocked only on an uncharged lesser included offense. Failure to do so will cause a subsequently declared mistrial to be without legal necessity." (*Id.* at p. 519.)

Stone went on to suggest a number of procedures a trial court might use in guiding a jury charged with the task of reaching a verdict on greater and lesser included offenses. It indicated as a judicially declared rule of criminal procedure that: "[para.] When a trial judge has instructed a jury on a charged offense and on an uncharged lesser included offense, one appropriate course of action would be to provide the jury with forms for a verdict of guilty or not guilty as to each offense. The jury must be cautioned, of course, that it should first decide whether the defendant is guilty of the greater offense before considering the lesser offense, and that if it finds the defendant guilty of the greater offense, or if it is unable to agree on that offense, it should not return a verdict on the lesser offense." (31 Cal.3d at p. 519.)

This was not a mandatory procedure, however, and *Stone* also indicated that trial courts retained the discretion to let a case go to the jury without a specific structure for the return of verdicts.

(*People v. Kurtzman* (1988) 46 Cal.3d 322, 328.)

787. Duty of Jury: Without *Stone* Instruction

You have been given [one] verdict form[s] for (the/each) count of (murder/manslaughter). [These instructions apply to each count separately.]

You may consider these different kinds of homicide in whatever order you wish. I am going to explain how to complete the verdict form[s] using one order, but you may choose the order you use.

As with all the charges in this case, to return a verdict of guilty or not guilty on a count, you must all agree on that decision.

If you all agree the People have not proved the defendant committed an unlawful killing, then you must indicate on the verdict form that (he/she) is not guilty.

If you all agree the People have proved the defendant committed murder, you must also decide what degree of murder the People have proved. You must all agree on the degree of murder (he/she) committed. If you all agree that the defendant is guilty of murder and on the degree of murder, then complete the form indicating that the defendant is guilty of murder and the degree. Do not return a verdict form indicating that the defendant is guilty of second degree murder unless you all agree that the defendant is not guilty of first degree murder.

<A. Voluntary Manslaughter: Lesser Included>

[If you all agree that the defendant is not guilty of first or second degree murder, but you all agree the People have proved (he/she) is guilty of voluntary manslaughter, then complete the verdict form indicating that (he/she) is guilty of voluntary manslaughter. Do not complete a verdict form indicating the defendant is guilty of voluntary manslaughter unless you all agree that the defendant is not guilty of murder.]

<B. Involuntary Manslaughter: Lesser Included>

[If you all agree that the defendant is not guilty of murder and not guilty of voluntary manslaughter, but you all agree the People have proved that the defendant is guilty of involuntary manslaughter, then complete the verdict form indicating that (he/she) is guilty of involuntary manslaughter. Do not complete a verdict form indicating the defendant is guilty of involuntary

38 manslaughter unless you all agree that the defendant is not guilty of murder
39 and not guilty of voluntary manslaughter.]

40
41 <C. Enhancements Alleged>

42 [You have also been given [a] verdict form[s] on the additional allegation[s]
43 related to (the/a) crime[s]. If you find the defendant not guilty of a crime, you
44 do not need to consider the additional allegation[s]. If you find the defendant
45 guilty of a crime, go on to consider whether the People have proved the
46 additional allegation[s]. If you all agree that an allegation has or has not been
47 proved, you must indicate that finding on the verdict form [for that
48 allegation].]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct the jury that it must specify the degree of murder and must reach a unanimous verdict on degree. (See *People v. Avalos* (1984) 37 Cal.3d 216, 228; *People v. Dixon* (1979) 24 Cal.3d 43, 52; Pen. Code, § 1157.)

If the jury indicates it is deadlocked on a lesser offense, then the court has a **sua sponte** duty to instruct the jury that it may render a verdict of partial acquittal on a greater offense. (*People v. Marshall* (1996) 13 Cal.4th 799, 826; *Stone v. Superior Court* (1982) 31 Cal.3d 503, 519.) In that case, the court should provide the jury with guilty/not guilty verdict forms and instruct the jury using Instruction 786, Duty of Jury: Deliberations and Completion of Verdict Forms. (*Stone v. Superior Court, supra*, 31 Cal.3d at p. 519.)

The court may not accept a guilty verdict on a lesser degree of homicide unless the jury unanimously agrees that the defendant is not guilty of the greater offense. (*People v. Kurtzman* (1988) 46 Cal.3d 322, 330; *People v. Avalos, supra*, 37 Cal.3d at pp. 216, 228.)

The court may not control the sequence in which the jury considers the various homicide offenses. (*People v. Kurtzman, supra*, 46 Cal.3d at pp. 322, 330.)

Do not give this instruction if felony murder is the only theory for first degree murder. (*People v. Mendoza* (2000) 23 Cal.4th 896, 908–909.)

This instruction should be modified if the highest charge is second degree murder or voluntary manslaughter. (*People v. Aikin* (1971) 19 Cal.App.3d 685, 700 [error

to instruct jury that it must agree on degree of murder where case submitted to jury on second degree murder only].)

AUTHORITY

Degree to Be Set by Jury ▶ Pen. Code, § 1157; *People v. Avalos* (1984) 37 Cal.3d 216, 228; *People v. Dixon* (1979) 24 Cal.3d 43, 52.

Reasonable Doubt as to Degree ▶ Pen. Code, § 1097; *People v. Morse* (1964) 60 Cal.2d 631, 657.

Must Permit Partial Verdict of Acquittal ▶ *Stone v. Superior Court* (1982) 31 Cal.3d 503, 519.

5 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Trial, § 631.

STAFF NOTES

Pen. Code § 1157:

Whenever a defendant is convicted of a crime or attempt to commit a crime which is distinguished into degrees, the jury, or the court if a jury trial is waived, must find the degree of the crime or attempted crime of which he is guilty. Upon the failure of the jury or the court to so determine, the degree of the crime or attempted crime of which the defendant is guilty, shall be deemed to be of the lesser degree.

Pen. Code § 1097:

When it appears that the defendant has committed a public offense, or attempted to commit a public offense, and there is reasonable ground of doubt in which of two or more degrees of the crime or attempted crime he is guilty, he can be convicted of the lowest of such degrees only.

***Stone* Instruction Not Required at Outset**

Stone and its progeny does not require the court to inform the jury of the possibility of returning a partial verdict until the jury has declared a deadlock on the lesser included offense. (*People v. Kurtzman* (1988) 46 Cal.3d 322, 330; *People v. Marshall* (1996) 13 Cal.4th 799, 826; *Stone v. Superior Court* (1982) 31 Cal.3d 503, 519; see also Staff Notes to Instruction 786.)